

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,475

645

DELORES ROBINSON,
as Administratrix of the Estate of William Johnson, deceased,
Appellant,

v.

CITY EXPRESS, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED

AUG 31 1961

Joseph W. Stewart
CLERK

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(i)

QUESTIONS PRESENTED

I. The question is does evidence that a pedestrian was crossing an intersection in an "unmarked" cross-walk, in broad day-light; and that he was struck by a truck approaching the intersection upon a straight and unobstructed road; and that the pedestrian was struck as he was almost to the safety of the opposite curb, present an issue of negligence of the driver for the jury?

II. The question is does the doctrine of last clear chance apply where the deceased in daylight walked slowly across a 46-foot wide street, and was struck when only 8 feet from the opposite curb; where the evidence discloses that the driver approaching the point of impact travelled over a straight road; where the driver admits to seeing the pedestrian when he (the pedestrian) was only 10 feet across the intersection; but where the pedestrian walked slowly 28 feet across the intersection after the driver saw him to the point of impact?

III. Is evidence that the crossing area is normally used for crossing to and from the bus stop at that location admissible on the issue of whether the area is a cross-walk; the alleged contributory negligence of the pedestrian; and the driver's knowledge of the customary use by pedestrians?

IV. The question is can a motorist prevent the submission of his negligence to the jury by simply denying that he saw the pedestrian because he emerged from behind a moving auto, where the physical evidence does not support the explanation?

V. The question is whether the investigating police officer may render a legal opinion in evidence upon whether or not the area used by the pedestrian was within an "unmarked" cross-walk?

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IN THE UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 16475

DELORES ROBINSON,
as Administratrix of the Estate of
William Johnson, deceased,

Appellant,

v.

CITY EXPRESS, INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action for wrongful death and under the survival statute against City Express, Inc., a corporation. The jurisdiction of the District Court below was founded upon the amount in controversy as in excess of \$3,000, and the statutory jurisdiction in actions for wrongful death and under the survival statute. The Trial Court required plaintiff to introduce evidence on liability before the evidence on causation and damages was concluded; and at the conclusion of the evidence of liability directed a verdict for the defendant, without any evidence being introduced by defendant

(other than evidence offered by defendant by adopting a witness as its own during cross-examination). The plaintiff Administratrix of the Estate appeals from the Order directing the verdict against her. Verdict was directed on May 16, 1961, and appeal was noted on June 1, 1961.

STATEMENT OF THE CASE

This is an action for wrongful death and under the survival statute. The Pre-Trial Order alleges that William Johnson, age 49, suffered a concussion and contusion of the brain; skull fracture; a broken leg and meningitis as a result of the head injuries, resulting in his death ten days after he was struck by defendant's truck. Mr. Johnson left surviving him ten children, five of whom are minors, and a widow. The Pre-Trial Order states as grounds for recovery the negligence of the defendant's truck driver for failure to keep a proper lookout; failure to yield the right of way to a pedestrian in a cross-walk; failure to drive at a reduced rate of speed on entering an intersection, and other violations of the Motor Vehicle Regulations. Plaintiff alternatively relies on the doctrine of last clear chance, asserting that decedent Johnson appeared to be oblivious to the danger of the approaching truck and that the driver in the exercise of reasonable care should have seen decedent's position of peril and obliviousness to danger in time to avoid the collision. The Trial Court directed a verdict against the plaintiff at the close of the evidence of liability. The plaintiff Administratrix appeals from that order.

This was a case of a pedestrian struck while crossing at an intersection in broad daylight (J.A. 51, 34). He had almost completed his crossing of a 46 foot wide intersection (J.A. 50) and was 8 feet 2 inches from the safety of the opposite curb when the defendant's cab-over-engine van type truck struck the deceased on the head and leg (J.A. 46, 45). The plaintiff's case consisted of the testimony of an eye witness (Malehorn) who was standing at a bus stop at the opposite curb toward which the deceased was apparently walking (J.A. 33); the testimony of the investigating

officer; and the deposition of defendant's truck driver. The investigating officer established the point of impact in the street by measurements to curb lines and established the point of impact on the truck as the left corner of the front bumper and the side view mirror directly above (J.A. 45). Photographs of the intersection (Plaintiff's Exhibits No. 2 - 7) and a D. C. Government plat (Plaintiff's Exhibit No. 8, J.A. 83) are in evidence. These show the intersection to be that immediately south of the 11th Street bridge where Good Hope Road and Anacostia Drive intersect with 11th Street. The pedestrian was walking EAST across 11th Street at the intersection of the streets. The defendant's truck was proceeding NORTH toward the intersection and the 11th Street bridge just beyond.

William Johnson, deceased, was first seen by the eyewitness, Malehorn, "A few minutes prior to the accident. [He] looked across Eleventh Street toward the intersection and [he] saw a colored man standing at the point where these two roads intersect with Eleventh Street." (J.A. 34). "He walked across at a slow gait, particularly for one crossing such a busy street; a steady pace. He didn't slow or speed up at any time once he started to cross. It was the same slow gait from the beginning until he was hit" (J.A. 37). The pedestrian walked almost at right angles to the curb line of 11th Street as he crossed the intersection, and at no time did the pedestrian appear to look either to his left or right to observe traffic (J.A. 34). The eye-witness, Malehorn, testified that "At this point on Eleventh Street it is customary for people to cross from the west side to the east side and vice-versa, getting on and off buses" (J.A. 21), but this testimony given on deposition was excluded by the Trial Court (J.A. 35). Witness Malehorn fixes the speed of the truck at approximately 25 miles per hour, although he admittedly did not observe the truck until the moment before the collision as he was particularly watching the pedestrian throughout his [the pedestrian's] crossing (J.A. 39).

The deposition of the truck driver, taken by the plaintiff, was introduced in evidence (J.A. 64). The driver testified that the street is straight

for 300 feet before the point of impact (J.A. 16); that he sits 3 or 4 feet higher than most drivers while operating this type cab-over-engine truck (J.A. 8). In that position he is able to see the tops of vehicles close by (J.A. 9). He testified that he first saw the pedestrian when the pedestrian was only 10 feet from the WEST curb (J.A. 12, 14). The collision occurred 8 feet 2 inches from the EAST curb. He testified that he was but 50 feet from the point of collision (J.A. 13) when he first observed the pedestrian, who, he says, emerged from behind a southbound auto (J.A. 11, 18). At this point, 50 feet from the pedestrian, he first blew his horn and applied his brakes (J.A. 11, 13). The driver further testified that from the time he first saw the pedestrian until the collision he saw no other cars come close to him (J.A. 14). During that time, the driver said, the pedestrian walked approximately 20 feet across the road (J.A. 14). Mr. Johnson, the deceased, was a man of average height (J.A. 16).

The plaintiff introduced Motor Vehicle Regulations relating to pedestrian's right of way in cross-walks (§22(a), J.A. 64); those sections defining unmarked cross-walks, intersections and sidewalks (§2, J.A. 65, 66); and that section requiring pedestrians to cross at right angles (§57, J.A. 65), together with other pertinent sections. After determining that plaintiff had completed her evidence on liability (but not including the causal connection and damages), the Trial Court directed a verdict for the defendant on the grounds that, even if deceased were within an unmarked cross-walk, there was no evidence of negligence of the defendant's driver; that the deceased was guilty of contributory negligence as a matter of law; and that the doctrine of last clear chance did not apply (J.A. 79, 80).

STATEMENT OF POINTS

I. The Trial Court erred in taking the case from the jury.

A. The jury could have found the defendant's driver negligent in failing to observe the pedestrian earlier, despite the driver's statement that he did not observe the pedestrian until only 50 feet away.

B. The defendant's driver was under a duty to yield the right of way to pedestrians in the intersection. The breach of this duty constituted an issue of negligence for the jury.

II. The Trial Court erred in excluding evidence that it was customary for people to cross the street at the place of the collision in proceeding to and from the bus stop.

III. The Trial Court erred in refusing to submit the case to the jury on the doctrine of last clear chance.

IV. The Trial Court erred in admitting the testimony of the police witness to the effect that the place where the deceased crossed was not an "unmarked" cross-walk.

MOTOR VEHICLE REGULATIONS

§52(a). When traffic control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is travelling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger. No pedestrian shall suddenly leave a curb or other place of safety and walk or turn into a path of a vehicle which is so close that it is impossible for the driver to yield.

§54. Notwithstanding the foregoing provisions of this Article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

§57. No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb or by the shortest route to the opposite curb, except in a crosswalk.

§53. Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

§2. Definitions. CROSSWALK (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs, or in the absence of curbs, from the edges of the traversable roadway.

CROSSWALK (b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface.

INTERSECTION - The area embraced within the prolongation or connection of the lateral curb lines or, if none, then of the lateral boundary lines of two or more roadways which join one another at an angle, whether or not one such roadway crosses the other.

SIDEWALK - That portion of a street between the curb lines or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians.

§22(a). No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

SUMMARY OF THE ARGUMENT

The Trial Court erred in taking the case from the jury. There was evidence from which the jury might have found that the driver, in the exercise of reasonable care, should have seen the pedestrian before he

did; that the driver was under a duty to yield the right of way to pedestrians in the intersection and the failure to yield that right of way constituted evidence of negligence for the jury. This was so, since the physical facts belied the explanation of the truck driver that he was unable to see the pedestrian until only 50 feet away because the pedestrian emerged from behind a moving auto. The evidence clearly shows that the pedestrian walked at least 20 feet across the intersection in that interval between his first sighting by the driver and the collision; and that the driver must have been further away from the pedestrian than the 50 feet he gives in order to have reached the same point as the pedestrian at the same time, considering the great difference in their respective speeds. Furthermore the point of impact was established conclusively as 8 feet 2 inches from the curb toward which the pedestrian was walking. Therefore even if the pedestrian did emerge from behind a moving auto there was still ample time for the driver to have avoided the accident. In any event the doctrine of last clear chance applied to the situation since the pedestrian in traversing 27 to 38 feet across the road before the impact must have been subject to view of the driver in time for the driver to have detected the obliviousness of the pedestrian to his danger. The fact that the pedestrian appeared oblivious to the danger to the witness Malehorn evidences that the same inference should, in the exercise of reasonable care, have been drawn by the driver in time to avoid the accident.

The trial court erroneously admitted the police officer's opinion evidence that the place where decedent was crossing was not an "unmarked" cross-walk. This duty devolved upon the Court and could not be relegated to the police officer for determination.

Finally, the evidence that the place where decedent was crossing was customarily used for crossing to and from the bus stop located there should have been admitted as material to the issue of contributory negligence; to the driver's imputed knowledge of the likelihood that pedestrians use that portion of the roadway; and as bearing upon the definition of cross-walk as

being the extension of that area normally used for pedestrian travel (in the absence of a sidewalk) extended across an intersection.

ARGUMENT

I

THE TRIAL COURT ERRED IN TAKING THE CASE FROM THE JURY

- A. The Jury Could Have Found The Defendant's Driver Negligent In Failing To Observe The Pedestrian Earlier, Despite The Driver's Statement That He Did Not Observe The Pedestrian Until Only 50 Feet Away.

The driver's explanation of the collision to the effect that he first saw the decedent when only 50 feet away from the point of impact was belied by the physical evidence that the pedestrian "walked at a slow gait" 20 feet after first being observed by the driver; while the truck travelled 50 feet during the same time (a speed ratio of 2:5). Assuming that the pedestrian was walking at no more than 2 miles per hour, this would necessarily require an average speed of only 5 miles per hour for the truck to the point of impact. The driver's own evidence is that he was travelling 15-20 miles per hour; and the evidence of witness Malehorn is that the truck was travelling 25 miles per hour. If the truck were travelling at 20 miles per hour, either the truck driver saw the pedestrian when 200 feet from the point of impact ^{1/} or the truck would have passed the point of impact long before the pedestrian reached the same point. In short, the accident could not have happened as the driver explains it, for the truck and pedestrian could not have reached the same point at the same time, assuming the speeds and distances given.

The driver's explanation for not seeing the pedestrian is also belied by the fact that the road is straight and unobstructed for 300 feet to the point of impact; that it was day-light; that the driver sits 3 or 4 feet higher than

^{1/} The pedestrian and truck were travelling at a ratio of speed of 1:10. The pedestrian at 2 mph: the truck at 20 mph.

most drivers while operating that truck and therefore ~~was~~ in an excellent position to observe the entire intersection; and by the well-known fact that a moving auto would block the view beyond it for only a very brief interval as it passed. It is not the situation of a row of parked autos and a child darting out between them. This was, on the contrary, an unobstructed intersection; a pedestrian walking slowly in broad daylight at an intersection normally used by pedestrians, and a pedestrian struck as he was almost to the opposite curb. We suggest that the driver has intimated the true explanation for the accident at J.A. 14, where he was questioned concerning his actions and thoughts when he first observed the deceased in the street, as follows"

"Q. Well, you blew your horn at that point. Did he turn his head in either direction? A. No, sir.

"Q. Didn't that seem unusual to you? A. Not at the beginning because a lot of people do that, they start out and they they --

"Q. They what? A. A lot of people do that, they start out and start across the street and then they notice traffic coming the other way and they stop and let traffic go by or turn around and go back to the curb."

We respectfully suggest that the jury could have found the explanation to this accident in the physical facts and this clue left by the driver: That the driver presumed that the pedestrian would turn around and go back or stop in the middle of the intersection; and that the driver while able to stop did not intend to do so, until the collision became "imminent" as the word is used in Standard Oil Co. v. McDaniel, (1922), 52 App. DC 19, 22, 280 F. 993, where this Court said:

"How near must the danger be in order that we may speak of it as 'imminent'? It may be that, if the driver waited until it became imminent before doing anything to avoid the accident, he would have waited too long. That is what Hargett seems to have done."

**B. The Defendant's Driver Was Under A Duty To Yield
The Right Of Way To Pedestrians In The Intersection.
The Breach Of This Duty Constituted An Issue Of
Negligence For The Jury.**

The Motor Vehicle Regulations (§52(a), J.A. 64), requires that

"the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger."

Other pertinent regulations indicate that a crosswalk may be "marked" or "unmarked" (§53, J.A. 67); and that an "unmarked" crosswalk is the extension of the sidewalks at an intersection (§2, Definition of Crosswalk, J.A. 65-67), or, in the absence of sidewalks, the extension of the area normally used for pedestrian travel (§2, Definition of Sidewalk, J.A. 67).

This Court has noted that under the definition of "crosswalk" in the Regulations, the pedestrian in the case of Johnson v. Geffen, decided December 1, 1960, 109 App. DC ____, was in an unmarked crosswalk and therefore entitled to put defendant to the proof. (See also Baltimore Transit v. State, 194 Md. 421, 71 A2d 442 (1950) for a similar definition of "unmarked" crosswalk in Maryland.) In the recent Johnson v. Geffen case, supra, the Trial Court's directed verdict against plaintiff was reversed. This was consistent with the earlier holdings of this Court in American Ice Co. v. Moorehead, 1933, 62 App DC 266, 66 F2d 729, where this Court held that a pedestrian having the right of way at a crosswalk under the traffic regulations could assume that the driver of a vehicle would exercise reasonable care; that the regulation placed the driver on notice that pedestrians had the right to use and cross the street; and that it was therefore the driver's duty to keep a lookout and to take proper steps to avoid an accident. American Ice Co. v. Moorehead, supra, at 62 App DC 266, 267., citing to the same effect Griffith v. Slaybough, 1928, 58 App DC 237, 29 F2d 437.

II

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE
THAT IT WAS CUSTOMARY FOR PEOPLE TO CROSS THE
STREET AT THE PLACE OF THE COLLISION IN PROCEED-
ING TO AND FROM THE BUS STOP

The fact that the deceased proceeded across the intersection at that point customarily used for crossing to and from the bus stop was material upon the issue of the deceased's alleged contributory negligence. That the crossing was so used was material as it tended to show the point from which deceased began his crossing was within the definition of "sidewalk" as that portion normally used for pedestrian travel, and that the crosswalk began at that point as an extension of the sidewalk. It was also material as tending to show notice to the driver who frequently travelled that place (J.A. 16) and so required him to anticipate and be on the lookout for pedestrians at that intersection. By the exclusion of this evidence, facts going to the very core of the reasonableness of the parties conduct were ignored. That fact was as essential to an understanding of the case as an understanding of the intersection itself, and the fact that the nearest other intersection is a long block away, as shown on the Plat of Plaintiff's Exhibit 8.

III

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE
CASE TO THE JURY ON THE DOCTRINE OF LAST CLEAR CHANCE

There are a number of possible and reasonable explanations for the manner in which Mr. Johnson crossed the intersection. The evidence shows that he stood at the curb for several minutes before he stepped into the intersection (J.A. 37), and that he stepped behind (not in front of) a southbound auto, according to the defendant's driver; that thereafter no other vehicle came close to the pedestrian until the truck struck him as he was almost across. This strongly suggests that he waited in all deliberateness for a break in the traffic before beginning across. It also suggests, inasmuch as he waited so long, that he knew it would take him longer than most to cross the street and so waited a clear opportunity.

While it is true that the witness Malehorn did not see him turn his head in either direction we must concede that it is possible that he could observe a considerable distance in either direction without appearing to do so. We should give consideration to the presumption that he exercised ordinary care for his own safety in accordance with the natural instinct of human beings to guard against danger. Baltimore Transit v. State, 1950, 194 Md. 421, 71 A2d 442. This is particularly appropriate where he has not survived to give evidence on his own behalf. It is, perhaps, within our common experience that there are persons who because of age, infirmity, or disability are unable to cross as quickly as they would like, a busy intersection. And so these unfortunates are literally dependent upon the kindness and mercy of the motorist when they are caught in the middle of an intersection by traffic nowhere in sight when they began their crossing. Some may think it safer, under those circumstances, to halt in the middle of the street and await a new opportunity to complete their passage. Others may think that course more dangerous than simply continuing on in a straight line at a slow pace; and still others may become frightened and retreat in confusion to make an attempt at crossing unopposed the next time. What we are here attempting to point out is that it is perhaps unwise to judge Mr. Johnson's conduct without considering those circumstances which common experience alone might suggest.

Nevertheless we must here discuss the doctrine of last clear chance on the assumption, arguendo, that he was contributorily negligent. Fortunately this Court has passed upon the doctrine most recently in Mathews v. Lindsay, decided July 7, 1960, 108 US App DC 292, 281 F2d 927. There a pedestrian attempted to cross a heavily traveled street in the middle of the block and was caught in the midst of traffic. The trial court submitted the case to the jury which returned a defendant's verdict. This Court reversed because the charge on last clear chance was confused by the charge on sudden emergency. It illustrates, however, the recent application of the doctrine of last clear chance, approved by this Court to a pedestrian crossing in the middle of the block, and re-affirms the rule of Capital Transit Co.

v. Garcia, 1952, 90 US App DC 168, 194 F2d 162, that "... in the District of Columbia the so-called last clear chance doctrine is broader than its name. A plaintiff who appears to be oblivious to danger, although he would be quite able to avoid it if he knew of its existence, is within this qualified exception to the rule that contributory negligence bars recovery ...". In the Garcia case, supra, a pedestrian walked against the side of a streetcar while watching a traffic light on his right. The contributory negligence of the plaintiff was obvious, but the Court held that passengers in the street car inferred from his conduct as he walked through the street toward the truck that he was oblivious to the car's approach, and that the jury might reasonably conclude that if the operator had used due care he would have observed the same things, drawn the same inference, and sounded his gong in time to avoid the accident. In this, the instant case, the witness Malehorn inferred from his observations of Mr. Johnson that he was oblivious of the danger of traffic during his entire passage across the intersection. The jury could infer that what was evident to Malehorn was evident to the driver, or in the exercise of reasonable care should have been evident in time to avoid the collision and well before he was only 50 feet from the pedestrian.

The doctrine of last clear chance was held applicable in Boaz v. Windridge & Handy, 1939, 70 App DC 25, 102 F2d 628, where the court held that a double-parked truck in the south lane from which the pedestrian had come was not such an obstruction as would prevent the application of the doctrine where the collision occurred in the north lane 6 or 7 feet from the curb. In Standard Oil Co. v. McDaniel, 1922, 52 App DC 19, 280 F2d 993, the plaintiff's decedent was crossing the avenue on a diagonal when he was run down by defendant's truck. The defendant appealed from the judgment of a jury and the Court at 52 App DC 21 said:

"Appellant urges that the exercise of the slightest degree of care at any moment before McDaniel reached the line of danger would have saved him. Perhaps so, but that is immaterial. This case does not turn on his negligence, but on the negligence of Hargett after he, as a reasonably prudent

"man, had reason to believe that McDaniel was unconscious of the approaching danger. Where the driver of a truck observes, or should observe, a person about to cross in front of him, and it is reasonably apparent that he does not appreciate that danger is near, the driver should employ all reasonable means in his power to avoid injuring him. He should proceed on the theory that the pedestrian may continue in his course heedless of his peril, and therefore should bring his vehicle under control so that he may stop if necessary before striking. He has no right under such circumstances to act on the assumption that the pedestrian will halt in time to save himself, or, if he does not, and is injured, that the fault will be his and not the driver's. It is the law that --

'The contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence'. Grand Truck Railway Co. v. Ives, 144 US 408, 429, 12 Sup. Ct. 679, 687 (36 L. Ed 485), citing several cases."

IV

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF THE POLICE WITNESS TO THE EFFECT THAT THE PLACE WHERE THE DECEASED CROSSED WAS NOT AN "UNMARKED" CROSSWALK

We should like to make it clear that we distinguish on this point between testimony of where on the street the point of impact occurred and testimony that the point of impact was not within an "unmarked" crosswalk. The former is evidence given from personal observation of the skid marks, brush marks, and debris. The latter is not personal observation for an "unmarked" crosswalk can only be visualized in the "mind's eye" by an understanding of the pertinent motor vehicle regulations. It is a legal judgment to be determined by the Court or by the jury under appropriate instructions from the Court. In Avignone et al v. Roumel, 1926, 56 App DC 320, 13 F2d 292, it was held error for the trial court to allow testimony upon the legal effect of a covenant in a deed. This, the Court of Appeals said, was a duty which devolved upon the Court and was simply the speculation

of the witness. While the admission of this testimony was not prejudicial in this appeal since the issue was not submitted to a jury, that is, unless the Trial Court was persuaded by the opinion of the police witness contrary to the Motor Vehicle Regulations, we raise the point at this time in the hope that prejudice will be avoided in the event this Court orders a re-trial.

CONCLUSION

It is respectfully submitted that the Trial Court erred in directing a verdict for the defendant; that there was sufficient evidence of the defendant's negligence and that the issue of contributory negligence was for the jury. It is further submitted that the trial court erred to the plaintiff's prejudice in excluding the offered testimony of the witness Malehorn that the crossing involved was customarily used by pedestrians; and that the Court erroneously admitted into evidence the police witness' opinion as to whether the area was an "unmarked" crosswalk.

For the foregoing reasons and authorities cited herein, the directed verdict in favor of the defendant should be reversed and the case remanded to the District Court with directions to grant a new trial.

Respectfully submitted,

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(i)

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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DELORES ROBINSON	:	
as Administratrix of the Estate	:	
of William Johnson, deceased	:	
1718 C Street, N.E.	:	
Washington, D. C.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 413-'58
CITY EXPRESS, INC.	:	
a body corporate	:	
200 N. Warwick Avenue	:	
Baltimore, Maryland	:	
Serve Resident Agent:	:	
Alton S. Bradford, Esq.	:	
1511 K Street, N.W.	:	
Washington, D. C.,	:	
Defendant.	:	

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>Year</u>	
<u>1958</u>	
Feb. 19	Complaint, appearance, Jury Demand; filed.
Feb. 19	Summons, copies (1) and copies (1) of Complaint issued; ser. 2-20-58.
Mar. 3	Appearance of Brault & Graham for deft.; c/m 2-27-58; filed.
Mar. 3	Answer of deft. to complt.; c/m 2-28-58; filed.
Mar. 3	Calendared. (N)
Mar. 24	Interrogatories of deft. to pltf.; c/m 3-20-58; filed.
May 17	Notice of pltf. to take deposition to Edward Irving Lynch; c/m 4-23-58; filed.

<u>Date</u>	<u>Proceedings</u>
<u>1958</u>	
May 17	Answer of pltf. to interrogatories; filed.
Jun 2	Deposition of Edward Irving Lynch, pp. 1-37; fee \$33.30 paid by pltf.; filed.
Oct 15	Called. McGuire, J.
<u>1959</u>	
July 16	Cause dismissed under Rule 13 as of 4/15/59 (N) AC/N (By Clerk)
July 17	Motion of pltf. to vacate and suspend operation of Rule 13; P and A; Notice; c/m 7-17-59; filed.
July 24	Order reinstating cause. (N) Letts, C.J.
Dec. 23	Notice of pltf to take deposition of Donald M. Malehorn; c/m 12-21-59; filed.
Dec. 24	First notice under Rule 13.
<u>1960</u>	
Jan. 16	Deposition of Walter F. Andrus published and filed.
Jan. 21	Consent order extending time for filing certificate of readiness to and including Feb. 25, 1960. (N) Curran, J.
Feb. 24	Certificate of Readiness (AC/N); filed.
Nov. 4	Pretrial statement of pltf.; filed.
Nov. 4	Pretrial statement of deft.; filed.
Nov. 21	Pre-trial Proceedings. Ass't Pre-trial Examiner.
<u>1961</u>	
May 10	Jury and two alternates sworn; trial respited to 1:45 P.M. May 12th 1961. (Rep. Nevitt). Holtzoff, J.
May 12	Trial resumed; same jury & alternates; respited to 1:45 P.M. May 15th, 1961; (reported by Nevitt); Holtzoff, J.
May 15	Transcript of evidence of Dr. James W. Braden of May 12, 1961; \$60.20 paid by deft.; defts. Exhibit #1; filed.
May 15	Trial resumed; same jury and alternates; respited to May 16th (Rep. Romig); Holtzoff, J.
May 16	Trial resumed; same jury and alternates. Alternate jurors discharged. Verdict for deft. by direction of the Court. (Rep. Nevitt); Holtzoff, J.

<u>Date</u>	<u>Proceedings</u>
<u>1958</u>	
May 16	Verdict and judgment for deft. (By direction of the Court.) (N). Holtzoff, J.
June 1	Notice of appeal of pltff.; deposit by Zitomer \$5.00. (Copy mailed to Brault & Graham); filed.
June 1	Cost bond on appeal of pltff. in amt. of \$250.00 with Glens Falls Ins. Co. approved and filed; filed.
July 10	Points on Appeal by pltff; c/m 7-10-61; filed.
July 10	Transcript of Proceedings of May 15 & 16, 1961, Vol. I, pp. 1-166; Reporter-Gerald Nevitt (Clerk's and Attorney's copies).
July 10	Plaintiff's Exhibits Nos. 2-7 incl.; No. 9; 8; filed.

[Filed February 19, 1958]

COMPLAINT

COUNT I

(Wrongful Death)

1. This Court has jurisdiction of the within cause of action, the amount in controversy exceeding the sum of Three Thousand (\$3,000.00) Dollars.

2. Plaintiff, Delores Robinson, is the duly qualified Administratrix of the Estate of William Johnson, deceased, having so qualified in the United States District Court for the District of Columbia, Holding a Probate Court, on February 15, 1958.

3. The Defendant, City Express, Inc., is a Maryland corporation doing business in the District of Columbia. Alton S. Bradford, Esquire, is the Resident Agent of the Defendant in the District of Columbia.

4. On, to-wit, August 15, 1957, Plaintiff's decedent, William Johnson, was a pedestrian crossing 11th Street at the intersection of Good Hope Road, S. E., Washington, D. C. At the time and place aforesaid, Defendant, City Express, Inc., a corporation, was the owner of a truck then and there operated by City Express, Inc., by and through its agent, servant, employee or permissive user, Edward Irving Lynch, in a northerly direction on 11th Street, S. E., Washington, D. C., in a negligent and careless manner, and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the negligence and carelessness of the Defendant, as aforesaid, the said truck ran into and collided with the Plaintiff's decedent, and threw him to the ground.

5. As a result of being struck as aforesaid, the Decedent, William Johnson, sustained severe and mortal injuries, which caused his death on August 25, 1957. Said decedent's Administratrix says that the wrongful and negligent action of the Defendant in causing the death of the said decedent was such that if death had not ensued, it would have entitled said decedent to have maintained an action and to have recovered damages against said Defendant in his lifetime, and that no such action to recover

damages was brought during his lifetime.

6. As a result of the wrongful death of said decedent, as aforesaid, his Administratrix has become obligated for the expenses of hospital and medical care, and the expenses for the decedent's funeral, in the total sum of One Thousand Five Hundred (\$1,500.00) Dollars.

7. As a result of the wrongful death of said decedent, there has been caused, and will continue to be caused, great pecuniary loss to his wife, Dorothy Haskins Johnson; and his children, to-wit: Lucille Washington, Odessa Williams, William Thomas Johnson, Jr., Orbree Thomas Johnson, Larrene Johnson, Dorothy Laverne Johnson, Isaiah Raffule W. Johnson, Mary Susan W. Johnson, David Johnson, and Delores Robinson.

WHEREFORE, Plaintiff, Delores Robinson, as Administratrix of the Estate of William Johnson, deceased, demands judgment against the Defendant, City Express, Inc., a corporation, in the sum of Fifty Thousand (\$50,000.00) Dollars; besides interest and costs.

COUNT II

(Personal Injuries)

1. Plaintiff, Delores Robinson, as Administratrix of the Estate of William Johnson, deceased, adopts and re-alleges the allegations of Count One, Paragraphs One, Two, Three and Four of this Complaint, as though they were here re-stated.

2. As a result of being struck as aforesaid, the decedent, William Johnson, sustained severe and permanent injuries in and about the head, body and limbs.

3. The Plaintiff's decedent, William Johnson, died on August 25, 1957; that his claim for damages occasioned by the injuries aforesaid, including an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, passed under the Survival Act of the District of Columbia to the Plaintiff, his Administratrix.

4. As a result of the injuries sustained, as aforesaid, the decedent, William Johnson, incurred hospital and medical expenses and was caused to lose time and earnings from his usual gainful occupation to the total value of One Thousand (\$1,000.00) Dollars.

WHEREFORE, the Plaintiff, Delores Robinson, as Administratrix of the Estate of William Johnson, deceased, demands judgment against the Defendant, City Express, Inc., a corporation, in the sum of Fifty Thousand (\$50,000.00) Dollars; besides interest and costs.

/s/ J. Zitomer
J. Zitomer
7705 Georgia Avenue, N. W.
Washington 12, D. C.
RAndolph 3-2270
Attorney for Plaintiff

JURY DEMAND

Plaintiff demands trial by jury.

/s/ J. Zitomer

[Filed February 28, 1958]

ANSWER TO COMPLAINT

Comes now the Defendant by and through its Attorneys of Record, and as Answer to the Complaint filed herein, states as follows:

1. The Complaint does not state a cause of action upon which relief can be granted.
2. The allegations of Paragraph 1, Count I, are admitted.
3. The Defendant is without information or knowledge sufficient to form a belief concerning the allegations of Paragraph 2, Count I, and can, therefore, neither admit nor deny the same.
4. The allegations of Paragraph 3, Count I, are admitted.
5. Answering the allegations of Paragraph 4, Count I, the Defendant admits the occurrence of an automobile accident on Eleventh Street, S. E., Washington, D. C., on the date alleged, involving one, William Johnson, now deceased, who was a pedestrian, and a truck owned by the Defendant and operated by its employee. All other allegations of said Paragraph 4, Count I, are denied.
6. The allegations of Paragraphs 5, 6 and 7, Count I, are denied.

7. Answering the allegations of Paragraph 1, Count II, the Defendant adopts by reference its answers to Paragraphs 1, 2, 3 and 4 of Count I.

8. The allegations of Paragraph 2, Count II, are denied.

9. Answering the allegations of Paragraph 2, Count II, the Defendant is without information or knowledge sufficient to form a belief concerning the allegations regarding the death of William Johnson; and further states that it is not required to answer the conclusions of law which constitutes the remaining allegations of said paragraph.

10. The allegations of Paragraph 4, Count II, are denied.

11. Further answering said Complaint, the Defendant states that any injuries or damages alleged to have been sustained by William Johnson resulted from his sole or contributory negligence.

BRAULT AND GRAHAM

By: /s/ Denver H. Graham

Denver H. Graham

Attorneys for Defendant

516 Transportation Building

Washington, D. C. - ST-3-4900

[Certificate of Service]

Thursday, May 15, 1958

1

Deposition of EDWARD IRVING LYNCH, agent of the defendant, called for examination by counsel for the Plaintiff, pursuant to notice, a copy of which is attached to the court copy of this deposition, in the offices of Brault & Graham, Esqs., Transportation Building, Washington, D. C., beginning at 4:30 o'clock p.m. before George M. Poe, Jr., a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

For the Plaintiff:

JOSEPH ZITOMER, ESQ.

For the Defendant:

BRAULT & GRAHAM, ESQS.

BY: LAURENCE T. SCOTT, ESQ.

* * * * *

2

BY MR. ZITOMER:

Q. Will you state your full name, please? A. Edward Irving Lynch.

* * * * *

Q. Were you driving a truck on August 15, 1957? A. Yes, sir.

* * * * *

3

Q. Will you describe the kind of truck you were driving on that day?

A. It is a cab over engine, White, 1956 Model, van type. What else do you want?

Q. Well, what do you mean by a cab over engine? A. That's a cab that sits over the engine. It is a snub nose they call them.

* * * * *

4

Q. When you were seated in the cab of this truck I understand you are seated over the top of the engine; is that right? A. Yes. You sit practically on top of the engine.

Q. When you are seated in that manner are you seated higher or lower than the height of the average driver in the City?

* * * * *

5

Q. How much higher do you sit in your vehicle? A. Three or four feet, I guess, higher.

Q. Well, then, from where you sit when you drive that vehicle are you normally able to see the tops of vehicles close by you? A. Oh, yes.

* * * *

Q. In order to see the roof do you have to look down to see the roof of a vehicle, of an automobile beside you? A. No, you wouldn't have to look down on the right-hand side, you can look out the window and you could see.

Q. In other words, your head is higher than the roof of a passenger automobile adjoining your cab? A. Yes.

* * * *

8 Q. Now, we referred a few minutes ago to a collision with a pedestrian. Where did this collision occur? A. About, approximately, 100 feet south of the bridge, the 11th Street Bridge.

Q. And in what direction were you traveling? A. I was headed north.

Q. In what direction were you traveling? A. Traveling north. I was headed north.

9 Q. And at this point 100 feet south of the bridge are there any other roads that joint the road you were on? A. Practically at the foot of the bridge there is a ramp that comes up from under the bridge that you make to get in my lane of traffic, and on the opposite side is a ramp going down that leads into the Anacostia Receiving Station and it also leads into Good Hope Road because you can't make a left-hand turn at Nichols Avenue and Good Hope Road, you have to use that ramp to get onto Good Hope Road.

* * * *

10 Q. Do you know whether there is a road that goes to the entrance of the Naval Receiving Station? A. Oh, I would say three-quarters of the way down the ramp is a little cutoff that goes in and there is a guard at the gate there.

* * * *

Q. Now, will you tell us -- A. That street is one-way, southbound, that ramp leading into the Naval Receiving Station.

Q. The ramp that goes into the Receiving Station, does this ramp join the road on which you were traveling? A. Right at the foot of the bridge it goes on 11th Street.

11 Q. Now, where did the collision occur with respect to the ramp that you are referring to? A. Well, it would be on the opposite side of 11th Street, on the right-hand side of the street.

Q. You say 11th Street. Is that the road you were traveling on?
A. That's the road I was on.

Q. And did the collision with the pedestrian occur at the point where the ramp meets with the road that you were on or did it occur north or south of that point? A. Right opposite but only up at the far side of the street.

Q. In other words, it was about that point but it was on the far side of the street? A. The east side of the street.

Q. In other words, it was in your lane of traffic? A. That's right.

Q. But it was about at the point where these roads join your road, the ramp joins the road on which you were traveling? A. That's right.

Q. How far from the west side of the road on which you were traveling was the pedestrian at the time of the collision?

* * * * *

12 A. I imagine about 25 feet because I take up one lane and he was on my left side when his foot went under the wheel, so that still left the width of my truck from the curb, and I was about six inches away from the curb, so he didn't get all the way across the street.

* * * * *

Q. From the curb on your right? A. That's right.

Q. What part of your vehicle was in contact with his body? A. The only part was the tire, he stuck his foot under the wheel.

Q. What tire was this? A. The left-hand front tire.

Q. The left-hand front tire? A. Yes.

Q. Did any other part of the truck come in contact with any part of his body or head? A. The mirror, and he brushed the mirror with his head. He just tilted it, but it didn't make any marks on him or anything.

13 The mirror has a rubber ring around it and it didn't break the mirror or do any damage.

Q. Well, now, would you start from the beginning and tell us in your

own words just how this collision occurred? A. Well, as I left Curtis Brothers and proceeded up Nichols Avenue to 11th Street I noticed three or four cars coming towards me, one of them was a police car, and the first car continued south on 11th Street, and the police car and these other cars went down the ramp towards the Naval Receiving Station, and behind this first car this man started to cross the street.

Well, I seen him after he came from behind this southbound car. I started to blow my horn and the man kept walking, and he never looked either way and I started to apply my brakes and I kept my hand on blowing the horn and he just ignored me. He didn't look north or south. He didn't look either way, he just kept steadily walking across the street, and when I stopped my wheels was sitting on his foot and he must have lost his balance and set down. He looked up at me -- and he started to look up at me and he said, "Man, get the hell off my foot."

And I backed up to free his foot and then I jumped out and by that time he got to his feet and he walked around and sat on the curb.

14 I hollered to the police and the police heard me blowing my horn, and my brakes squealed and I beckoned him to come back. He come back up to the grass spot and got behind the truck and I looked at the colored fellow's foot and I seen he was injured and I told the police --

Q. Go ahead. A. -- to get an ambulance, and he called the ambulance on the radio and he come back and he questioned the man. He asked the man his name and the man couldn't give him his name.

Q. What was the man doing at that time? A. He was just sitting holding his foot. He looked like he was either drunk or sick to me. He looked like he was in a daze. He looked like he was in a daze when he crossed the street.

As the front part of my truck passed him I could look right into his face and he looked like he was in a daze.

Q. Well, are you sure he looked like he was in a daze? A. Yes, sir.

Q. You could tell that from what you saw? A. He looked like he was either, you know, drunk or in a daze. I guess three foot of my truck

had done passed him and I am looking right at him and he hasn't seen me yet.

Q. Well, for how long a time did you observe him to come to the conclusion that he was in a daze? A. When he was right opposite the truck, and I could look out the window and look him in the face, that's when I figured he was either drunk or sick.

15 Q. Now, what side of the street did he come from? A. The west side.

* * * * *

Q. At what point on the highway that you were riding on with reference to these ramps did he begin to cross? A. Oh, I guess five or 10 feet. It is like a wedgeshape like.

Q. What is it that is wedge shaped? A. Where the ramp comes down and 11th Street continues. It is like a wedge shape, like that (indicating). It must have been up in that wedge shape somewhere.

Q. Was the wedge portion -- is that part of the highway, the wedge portion? A. No.

Q. What is this wedge portion made of? Is it a grassy plot with curbing around it? Is that what you mean? A. I couldn't say that.

Q. Does it have a curb, the wedge shape? A. Yes.

Q. In other words, it is part of the sidewalk or grass, it is not part of the roadway? A. I don't know what it is.

16 Q. And this is the point he began to walk from? A. I imagine so. I didn't see him until he was out in the street. That is the only place he could have come from.

Q. How far was he into the street when you first saw him? A. He walked behind an automobile. He must have been at least 10 feet out in the street before I seen him.

Q. Did you see him while he was behind this vehicle? A. No.

Q. What kind of an automobile was he behind? A. A passenger automobile, but I couldn't tell you what make or model.

Q. And you couldn't see him at that time? A. No, sir. I was watching the traffic coming towards me.

Q. Where was your car at that time? Where was your truck, I am

sorry? A. I was headed north on 11th Street.

Q. How far back from the point of the collision was your truck when you first saw him? A. Approximately fifty feet.

Q. Approximately fifty feet? A. Fifty.

Q. That's 50? A. Fifty feet, yes.

17 Q. What was your speed at the time you first saw him? A. Between 15 and 20 miles an hour.

* * * *

Q. From the time that you first saw him just tell us exactly what he did?

* * * *

A. He just walked across the street.

Q. Well, describe the way in which he walked? A. He walked from the east towards the west, I mean from the west side toward the east side, and he didn't look either up or down the street, he just looked right straight across.

Q. He didn't look either up or down? A. He didn't look either way.

Q. Did he ever hesitate? A. He never hesitated, just a steady gait right straight across.

Q. Was he walking fast or slow? A. The average man's pace, I would say. The average man of --

Q. What direction did his head appear to be turned? No, excuse me. Was his head turned in any way? A. No, sir.

18 Q. Did he ever turn his head in any way? A. No, sir, he didn't turn his head even when his foot came in contact with the wheel.

Q. Was there any other traffic that came near him from the time that you first saw him to the time of the impact? A. I don't know what you mean now.

Q. Well, when you first saw him I gather from what you have said that he had emerged from behind a vehicle? A. That's right.

Q. And you were then at that point fifty feet in back of the place where the collision occurred? A. That's right.

Q. And my question is: Was there any other vehicle that came

close to him thereafter than you did, closer to him thereafter than you did? A. No, sir.

Q. You understand what I mean? A. Yes. The other cars went down the ramp and I was going north.

Q. In other words, there was no southbound traffic that came close to him or came near him or came by him as you were traveling back?

A. No; the car he walked behind and the rest of them went behind the ramp.

19 Q. Were there any other cars ahead of you? A. That I couldn't answer. I don't remember.

Q. Well, then, do you recall that you saw any other vehicles near him after he emerged from behind this car as you put it? A. No, sir.

Q. Was he standing upright as he walked or was he -- A. Yes.

Q. In other words, was there anything unusual at all about the manner in which he walked? A. No, sir; he just went like an ordinary man walking across the street.

Q. Did it appear in any way unusual to you that he didn't turn his head in either direction? A. At the beginning, no, but the further he got -- I thought then something was wrong with him.

Q. What portion of the highway was he in with respect to the width of the highway? What part of the width of the highway was he on when you first saw him? A. Well, he was approximately 10 feet from the west curb and it is a four lane highway, two lanes in each direction.

Q. How many feet did he walk from the time you first saw him until the time of the collision? A. Approximately 20 feet, I guess.

20 Q. About how many steps did he take? A. I couldn't tell you that.

Q. Where was he with respect to the width of the highway when you blew your horn for the first time? A. When I first noticed him, when he came out from behind this automobile.

Q. Well, you blew your horn at that point. Did he turn his head in either direction? A. No, sir.

Q. Didn't that seem unusual to you? A. Not at the beginning because a lot of people do that, they start out and then they --

Q. They what? A. A lot of people do that, they start out and start across the street and then they notice traffic coming the other way and they stop and let traffic go by or turn around and go back to the curb.

Q. Are you familiar with the way traffic travels on that highway?

A. Yes, sir; it travels just the same as on any other street.

Q. Is it a pretty heavily trafficked road? A. At certain times of the day.

Q. Was it heavily trafficked at that time of day? A. Not at that time of the day.

21 Q. Earlier you indicated a wedge-shaped portion that he must have come from? A. That's right.

Q. How do you gather that he came from that portion of the highway? A. That's the only logical place he could have come from.

Q. How do you form that opinion? A. I would say the bridge is here (indicating), and this ramp goes down here and 11th Street comes in this way, (indicating).

Q. Don't point with your fingers because that can't be taken down on the machine. A. Well, he walked a straight line across the street and --

Q. In other words, projecting a straight line backward from the way in which he was walking it would go to that point is that what you mean?

A. Yes; from that point.

Q. What had your speed been for the few minutes before the collision? Let me put it this way: When had you last stopped before the collision? A. Well, I don't remember whether I stopped at Nichols Avenue and Good Hope Road or not. There is a traffic light there. I could have

22 stopped there.

Q. After crossing that did you then stop? A. No.

Q. What was your speed from the time you crossed that intersection up to the time of the collision? A. There is a grade there. It would have been a low speed because you have to come up the grade and then it levels off at the top, so if I stopped at the light and started at nothing and got up about 15 or 20 miles an hour.

Q. Is the road straight from the intersection to the point of the collision? A. No, sir.

Q. Will you describe the way that it turns? A. The traffic light is at the bottom of Nichols Avenue and Good Hope Road and you go up a small grade and then the road makes a turn to the left, just a slight turn, it isn't too much of a turn, and then you go about a quarter of a block, I guess, maybe a half a block to the point of the collision.

Q. You go quite a distance, don't you, from the time of that turn to the point of the collision? A. Yes.

Q. As much as 100 yards or 300 feet? A. I guess it is.

23 Q. Is the road straight from when you make the turn, after you make the turn? A. Yes, sir.

Q. As you came towards that point in the road where the collision occurred, did you see any other pedestrians crossing in that area -- A. No, sir.

Q. -- before the collision? A. No, sir.

Q. You have traveled this area before, this route before? A. Yes, sir.

Q. Do you know from your own experience before that time whether or not other pedestrians had frequently traveled at that point? A. Across the street, you mean?

Q. Yes. A. No, sir, I hadn't noticed that.

Q. Is there any intersection, any other roads that join the road that you were on, that you were riding on, anywhere near the place of the collision? A. There are none there outside of the ramps.

Q. Outside of these ramps? A. That's right.

Q. The nearest intersection of the nearest other road that joins your road, the road that you were on, would have been back at Nichols

24 Avenue? A. Or Good Hope Road.

Q. Or after you crossed the bridge? A. Yes.

Q. In other words, it is Nichols Avenue and Good Hope Road?

A. Yes.

* * * * *

Q. When you first saw this pedestrian in the position which you stated as, I believe, 10 feet from the west curb, what did you do? A. I started sounding the horn and started to apply my brakes.

Q. Immediately, at the same time? A. Yes, sir.

Q. You started to do both? A. Yes, sir.

Q. Did you apply your brakes very quickly or very forcibly?

A. Not at first. When I seen that he didn't pay any attention to me that's when I applied them with force.

Q. You applied them with more force? A. Yes, sir; that's right.

25 Q. How far were you from him when you began to increase the force as you applied the brakes? A. Off-hand I couldn't tell you. I don't remember that.

Q. Were there any other trucks on the highway that you can recall?

A. Not that I know of.

Q. Did you see anyone else standing on the side of the road, on either side, or walking along either side of the highway shortly before or shortly after the collision? A. Two sailors were standing at the bus stop right opposite where the collision happened.

Q. And did you see anyone else? A. No, sir, nobody else was around.

Q. How long had you seen those sailors before the collision?

A. Well, I would say fifty feet. When I seen the man naturally I seen the sailors, too.

Q. Was there any reason why you didn't see the sailors at a further distance than 50 feet? A. No. They were standing back from the curb, they weren't out close to the curb or anything. I didn't pay any attention to them.

Q. You indicated earlier that you were watching the traffic in your lane of travel? A. I was watching traffic coming in the opposite direction.

26

* * * *

Q. Is that the reason you didn't see this man in the highway? A. You mean standing on the side.

Q. No. The reason you didn't see the man who you were in collision with. A. I seen him after he come from behind that car, but I didn't see him before that.

* * * *

Q. And what is your reason, again, for not seeing him before?

A. I was watching traffic coming towards me.

Q. Watching traffic coming towards you? A. That's right.

Q. And what obstructed your view? A. Nothing obstructed my view. If you are watching traffic coming towards you you wouldn't see the man standing or pay any attention to the man standing on the opposite curb.

Q. I am referring now to the man who you were in a collision with, the man that your vehicle was in collision with? A. Yes.

27 Q. Mr. William Johnson, the one who is now dead? A. That's right.

Q. I am asking you whether or not there was any obstruction to your vision which prevented you from seeing him before fifty feet, which prevented you from seeing him earlier? A. No, I wouldn't say so. If he had made some kind of funny movement or something it might have attracted your attention, or something, but he could have been standing and I wouldn't have paid any attention to him.

Q. You mean standing? I am referring now to while he was walking the first 10 feet across the highway. A. Well, the car --

Q. The car what? A. If you walk behind the car the car would hide him from me.

Q. The car hid him from your view? A. Yes, because he walked behind the car. But standing on the curb I wouldn't have seen him or paid much attention to him. You got to watch the traffic.

Q. How tall was this man, about your height or shorter or taller? A. He was the average size man.

28 Q. Was there any particular reason why you were watching the traffic coming towards you? A. No. You always have to watch the traffic coming towards you. You never know what the other guy is going to do.

Q. In other words, you were watching all the road, weren't you, all the highway? A. Oh, yes.

Q. And the position that you were in on top of the engine on your

cab put you higher than the rest of the vehicle and the traffic, didn't it?

A. Yes. To a certain extent the further away you get --

Q. The what? A. The further away from another vehicle -- well, naturally, you wouldn't see as much.

Q. The further away? A. That's right.

Q. But at a distance of 50 feet away would you see a man standing or beside another vehicle even though the vehicle was between you? A. I wouldn't say for sure. I wouldn't know.

Q. Well, you drive this truck quite frequently, don't you? A. That's right.

Q. Don't you from your own experience know whether or not you can see people, see beyond the truck by looking over the top of an automobile? A. If it is close up to me you can possibly see it.

29 Q. Wasn't this Mr. Johnson actually taller than the vehicles that were going by him? A. I wouldn't know. I never stood alongside another vehicle. I wouldn't know.

Q. You never stood beside another automobile? A. Yes, but some cars is higher than others and I don't remember what kind went by.

Q. Do you know of any automobiles that are taller than yours?
A. Offhand I don't know.

* * * * *

33 Q. Was Mr. Johnson, the man on whose behalf this suit is being brought, did he fall to the ground after the collision? A. He didn't fall to the ground. When I stopped my wheels the tire was on top of his foot, and I believe he probably lost his balance and just sat down. He sat down and looked up and that's when he said, "Man, get the hell off my foot." He didn't fall down.

Q. When he said that was he standing? A. No, he was sitting down.

34 Q. What kind of a mirror was that on the side of your truck which you said was in contact with his head? A. It is a rectangular mirror. It has a replaceable glass with a rubber edging around it where you can take the rubber off and replace the glass and put other rubber back on.

Q. How was the mirror held in place? A. A bracket.

Q. What kind of a bracket? Is it a metal bracket fastened permanently to the side of the vehicle? A. Yes.

Q. This bracket, does it move? A. It moves with the door.

Q. When the door is locked this bracket is just as firm as the truck? A. That's right. He didn't hit the bracket.

Q. But the mirror is pivoted? A. On a ball joint.

Q. This mirror is on a ball and socket? A. Yes; right in the center of the mirror is a round ball like that (indicating), and you can adjust it sideways and up and down.

Q. Can you turn the mirror in any direction? A. Yes, in any direction.

Q. And how large is the mirror? A. About eight inches long and
35 possibly four inches wide.

Q. Made of glass? It is a glass mirror, isn't it, a regular mirror?
A. Yes; a regular rearview mirror.

Q. You say he didn't hit the bracket? A. No.

Q. How do you know he didn't hit the bracket? A. Because I see him when his head brushed the mirror. It didn't tilt it much, just a little bit. I showed it to the officer.

Q. You saw that? A. I was looking right straight at him. I hollered at him.

Q. How close did his head come to this bracket? A. He was three inches away from the bracket.

Q. About three inches away from the bracket? A. The bottom of the mirror just brushed him like that (indicating).

Q. This mirror is on the corner of the vehicle? It was on the front corner of the vehicle? A. Yes.

Q. Right in the very front of it? A. That's right.

Q. It isn't the back? A. That's right.

36 Q. In other words, the front of your truck is flush, your windshield is flush with the very front of the truck? A. That's right.

* * * * *

1 Deposition taken by Walter F. Andrus, Official Court Reporter and
Notary Public of the State of New Jersey, of DONALD M. MALEHORN, at
the offices of Barrett & Miller, 37 Kings Road, Borough of Madison, Coun-
ty of Morris, State of New Jersey, on Friday, January 8, 1960, at 4:30 p.m.

* * * * *

2 DIRECT EXAMINATION BY MR. TELTSEER:

* * * * *

6 Q. Do you know whether or not this is a customary place for people
to cross Eleventh Street?

MR. CULLEN: I object to the question as calling for a conclu-
sion on the part of the witness.

A. I know people do cross at this point particularly, sailors and
other naval personnel coming from the main gate of the naval station and
wanting to get across to the easterly side of Eleventh Street to get a bus
or go to the park or whatever.

Q. Is there any other place in that area where persons normally
cross Eleventh Street?

MR. CULLEN: I object to the question on the ground that it
calls for a conclusion on the part of the witness as to where other persons
could cross would be irrelevant and immaterial.

A. At this point on Eleventh Street it is customary for people to
cross from the west side to the east side and vice-versa, getting on and
off busses.

Q. Is there any other area on Eleventh Street where it would be
customary within the immediate range of a half mile on either side?

MR. CULLEN: I object to the question again as being irrelevant
and immaterial.

7 A. There might be others but I am not familiar with them. This is
a place in this general area where people do cross. There might be others.

Q. You don't know of any others? A. I do not.

* * * * *

PRE-TRIAL ORDER

[Filed November 21, 1960]

November 21, 1960

Survival action for negligent personal injuries, and wrongful death action.

UNDISPUTED FACTS:

On Aug. 15, 1957, about 10:15 a.m., William Johnson was proceeding from the west to the east curb of Good Hope Road, south of the south end of the 11th St. Bridge crossing Anacostia River, in the District of Columbia, when he was struck by a truck owned and operated by D, City Express, Inc., a corporation, which truck was proceeding north on Good Hope Road.

At the time of the accident the weather was cloudy and the pavement dry. The speed limit was 25 mph.

William Johnson died on August 25, 1957 at the age of 49.

Decedent Johnson was survived by the following persons:

Dorothy Haskins Johnson, widow, age 45
Lucille Washington, daughter, age 28 (born 5/5/29)
Odessa Johnson Williams, daughter, age 25 (born 7/15/32)
Delois Johnson Robinson, age 23 (born 3/27/34)
William T. Johnson, Jr., age 20 (born 12/4/36)
Orbee Thomas Johnson, age 18 (born 5/15/39)
Larrene Johnson, age 15 (born 1/22/42)
Dorothy Luverne Johnson, age 12 (born 7/19/45)
Isaiah Raffule Johnson, age 9 (born 4/2/48)
Mary Susan Johnson, age 8 (born 8/6/49)
David Johnson, age 5 (born 7/3/52)

The administratrix of the estate of William Johnson is Delores Johnson Robinson (listed on birth certificate as "Delois"), Adm. No. 94725 this Court.

PLAINTIFF contends that decedent Johnson was walking within the crosswalk (unmarked) and had traversed about 3/4 of the roadway when he was struck by D's truck. P contends that the accident was caused by the following negligence of D's driver:

Failure to keep a proper lookout

Failure to yield right of way to pedestrian in crosswalk (Sec. 52a)

Failure to control vehicle so as to avoid colliding with pedestrian
(Sec. 22a and 54)

Excessive speed under existing conditions (Sec. 22a)

Failure to drive at reduced rate of speed on entering intersection
(Sec. 22c)

Exceeding speed limit (Sec. 22b)

Failure to give warning when necessary to avoid colliding with
pedestrian (Sec. 54)

P alternatively relies on the doctrine of last clear chance, asserting that decedent Johnson appeared to be oblivious to the danger of the approaching truck but that D's driver continued on and failed to take precautions to avoid colliding with decedent, although in the exercise of due care said driver should have seen decedent's position of peril and obliviousness to danger in time to avoid the collision.

PERSONAL INJURIES:

Broken left leg

Concussion and contusion of brain

Skull fracture

Meningitis, as result of basal skull fracture, resulting in death.

Permanent: (Decedent 49 at time of accident)

death

20% permanent disability of left leg

SPECIAL DAMAGES:

Casualty Hospital	\$527.60
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Dr. Braden	100.00
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Dr. Fulcher (no bill submitted yet)	
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Funeral Bill	250.00
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Loss of earnings by decedent:

(\$50 a week as upholsterer and odd jobs)

8/15/57 to 8/25/57 at \$10 per working
day \$70.00

Loss of earnings for normal expectancy after
8/25/57 in excess of contributions of \$25 a
week to dependents, namely, \$25 per week,
for 21.1 years \$27,430.00*

claimed Total loss of earnings by decedent \$27,500.00

* In the event it not be proved that decedent's death resulted from the collision, P claims in the survival action the total loss of earnings to decedent during his life expectancy.

P administratrix claims on behalf of decedent's dependents contributions of \$25 per week for 21.1 years, discounted at present worth.

P claims in the survival action damages for the personal injuries to decedent, including impairment of earning capacity, and loss of earnings in the amount of \$27,500.00.*

P claims in the wrongful death action all the other special damages and the loss of contributions to decedent's dependents as specified above, and loss of decedent's services to his minor children, including parental guidance.

DEFENDANT denies all allegations of negligence on its part and denies that P's decedent was injured or damaged as the result of any negligence by it or its driver.

D denies that P's decedent was crossing the street within the crosswalk. D contends that the accident resulted from the following sole or contributory negligence of P's decedent:

Walking into path of D's truck from behind moving traffic

Crossing street at place other than designated crosswalk

Failure to yield right of way (Sec. 53)

Suddenly stepping from a position of safety into the path of D's vehicle when it was too late to yield (Sec. 52a)

Proceeding across the street under the influence of alcohol and/or in a semi-conscious condition

Failure to keep a proper lookout

D denies that decedent's death was caused by the collision.

STIPULATIONS:

Facts under "UNDISPUTED FACTS"

It is stipulated the following may be admitted without formal proof, subject to all other objections:

HEW Mortality Table

D. C. Traffic Regulations

Hospital Bill — P's PT Exhibit #1

X-ray plates

P's PT Exhibits #3 to 12 — Birth Certificates

* In the event it not be proved that decedent's death resulted from the collision, P claims in the survival action the total loss of earnings to decedent during his life expectancy.

P's PT Exhibits #13 to 18 inclusive — Photographs

P's PT Exhibit #19 — Copy of Death Certificate

D's PT Exhibits #1 to 5 inclusive — Photographs

The following have been identified by the Pretrial Examiner but no stipulation is made with reference thereto:

P's Exhibit #2 — Bill of Dr. Braden

D's PT Exhibit #6 — Autopsy report

Counsel for P agrees to furnish counsel for D, within one week, copies of all medical reports not heretofore furnished, if any.

Counsel for P agrees that D may take the depositions of Dr. Fulcher and/or Dr. Braden provided they shall not interfere with the trial date.

Counsel agree to exchange, within two weeks, the names and addresses of all witnesses known to them, including experts, if any, and if they learn of any additional witnesses prior to trial to exchange their names and addresses promptly.

The Examiner has requested counsel to appear at trial with the maximum amount of authority to settle this case which will be allowed them by their principals.

Assistant Pretrial Examiner

ATTORNEYS:

Plaintiff

Defendant

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MR. ZITOMER: Yes, Your Honor.

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10

MR. ZITOMER: Your Honor, those show the skid marks taken cross-
In other words, they are not looking down the line of travel of the
, but across the skidding of the truck.

12

THE COURT: Very well.

✱

✱

MR. ZITOMER: I understand the clerk has marked that photograph No. 7, Your Honor. And photograph number 7 also shows the scene of the accident taken at the same time as photograph in No. 6, showing the overall scene of the accident.

THE COURT: Very well.

(Photograph of scene was marked Plaintiff's Exhibit No. 7 and received in evidence.)

MR. ZITOMER: Your Honor will observe in both photographs the significant landmark is a bus stop; the significant landmark in both of those photographs. The bus stop seen in those photographs is the same bus stop.

* * * * *

13 MR. ZITOMER: Your Honor, may I mark both of the photographs,
14 circle the stop sign in both photographs? I wish to put a circle around
the bus stop in both photographs.

THE COURT: You may do so.

* * * * *

17 MR. ZITOMER: Your Honor, at this time I would like to offer into
evidence the entire deposition of the witness Donald M. Malehorn, whose
deposition was taken on January 8, 1960, in the Borough of Madison, County
of Morris, State of New Jersey. The deposition was taken Friday, January
8, 1960, at 4:30 p.m.

* * * * *

18 MR. ZITOMER: (Reading.)

"Question: Mr. Malehorn, how old are you?

"Answer: Twenty-nine.

"Question: Where do you live?

"Answer: 57 Moraine Road, Morris Plains, New Jersey.

"Question: That is your permanent residence?

"Answer: It is.

"Question: How are you employed?

"Answer: I am an attorney associated with the firm of Barrett
& Miller, 37 Kings Road, Madison, New Jersey.

"Question: You are a member of the New Jersey Bar?

"Answer: Yes.

"Question: Are you a member of any other Bar?

"Answer: Only the New Jersey Bar.

"Question: Mr. Malehorn, on August 15, 1957, you were a witness to an accident in which a William Johnson was injured, isn't that correct?

19 "Answer: Yes.

* * * * *

"Question: Can you tell us where in particular the U. S. Naval Receiving Station is with reference to where the accident occurred?

"Answer: Well, at the time the accident occurred I was standing on the east side of Eleventh Street at the bus station, waiting for a bus proceeding north to take me into Washington, D. C. proper. There is a road leading from the main gate of the naval station on to Eleventh Street which intersects directly across the street from Eleventh Street where I was standing."

* * * * *

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MELVIN HIRSHMAN

was called as a witness by plaintiff and, having been first duly sworn, was

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examined and testified as follows:

DIRECT EXAMINATION

* * * * *

BY MR. ZITOMER:

Q. Are you a member of the Bar of the District of Columbia, sir?

A. I am.

Q. Are you associated with me in this case? A. I am.

Q. Mr. Hirshman --

THE COURT: I think, for the purpose of the record, you always want to get a witness's address.

BY MR. ZITOMER:

Q. Will you state your address for the record. A. My home?

Q. Your home and office address. A. My home address is 6656 Georgia Avenue, Northwest, Apartment B-2, Washington 12, D. C. My office address is 805 G Street, Northwest, Room 508, Washington 1, D. C.

Q. Mr. Hirshman, are you familiar with the roadways which are depicted in Plaintiff's Exhibit No. 6 and 7? A. I am.

22 Q. I now hand you Exhibit No. 7.

THE COURT: I wonder, gentlemen, if this could not all be stipulated -- can it not be?

MR. GRAHAM: Yes, if all Mr. Zitomer wants to do is prove which way the roads run.

THE COURT: Is that all you want to do?

MR. ZITOMER: Yes, Your Honor.

THE COURT: Suppose you make a statement what you want to prove. I am sure that Mr. Graham will stipulate if he agrees it is correct.

MR. ZITOMER: I would like to show that on Plaintiff's Exhibit No. 1 there is a projection of a curve, in a circular point; that the road above this curve, which I would like to mark, goes to the Naval Receiving Station, which is the same road identified by the witness in the deposition as the road going to the Naval Receiving Station. There is, in addition, another road which is shown just below that, which is the road which proceeds down to the Anacostia River.

THE COURT: In other words, two roads coming together --

MR. ZITOMER: Two roads come together.

THE COURT: -- at a 90-degree angle, or at an acute angle.

23 MR. ZITOMER: The angle that they come together at the river makes a 90-degree angle at the river, with Eleventh Street, but after making that intersection with Eleventh Street, it then curves down to the river below the bridge. The road going to the Anacostia Naval Receiving Station intersects at an angle of approximately 45 degrees with Eleventh Street.

MR. GRAHAM: These are, I believe, Your Honor, one-way service roads as you go across the bridge. Traffic may either proceed straight out Eleventh Street or make a right turn into these one-way streets. So I

don't think it is a typical type intersection. But they are the service roads; like a cloverleaf, one of them goes back down underneath the bridge.

THE COURT: Are the facts stated by you two gentlemen stipulated by each of you?

MR. ZITOMER: Your Honor, I don't know whether I understood counsel correctly or not.

The road which goes to the Anacostia Naval Receiving Station handles regular traffic. This goes down to intersect at Nichols Avenue and Good Hope Road.

THE COURT: Is that agreed?

MR. GRAHAM: It is my understanding that that is the way it does but that it is one way.

24 THE COURT: Well, you stipulate it is one way? I don't know whether that is important or not.

Have you got a map or plat? That would be the best way to do it.

MR. ZITOMER: May I show this plat to Your Honor?

THE COURT: No. Just a moment. Have you got a plat or a map?

MR. ZITOMER: Yes, Your Honor.

THE COURT: Why not offer it in evidence? Is it stipulated?

MR. GRAHAM: I have never seen it.

MR. ZITOMER: Your Honor, I did not produce this at pretrial. It came as an afterthought.

THE COURT: Suppose you look at it, Mr. Graham.

Where did you obtain it?

MR. ZITOMER: This came from the District of Columbia government, the highway department, sir.

THE COURT: Then I am sure it will be stipulated.

MR. GRAHAM: I will stipulate to the plat upon Mr. Zitomer's representation that it is a plat from the District of Columbia highway department.

THE COURT: Why don't you offer it in evidence? And that speaks for itself.

MR. ZITOMER: Your Honor, would I be permitted to have this witness

mark with an "X" the place where the stop sign is on this plat which is illustrated in the photograph?

25 THE COURT: To mark with an "X" what?

MR. ZITOMER: The place where the stop sign is for purposes of orientation.

MR. GRAHAM: If Your Honor please, Mr. Zitomer keeps referring to a stop sign. I know of no stop sign involved in this accident.

MR. ZITOMER: Bus stop sign.

MR. GRAHAM: And I am going to object to that, because this map purports to be to scale.

THE COURT: Yes. I think your point is well taken, because if you are going to put any marks on a map made to scale, the marks ought to be made according to scale also.

* * * * *

(Plat of scene marked Plaintiff's Exhibit No. 8 and received in evidence.)

* * * * *

29 CROSS-EXAMINATION

BY MR. GRAHAM:

Q. Mr. Hirshman, immediately opposite the bus stop sign which you pointed out on the map, there are two roads. Are both of those roads one-way streets for southbound traffic? A. Yes; that is correct.

30 Q. In other words, traffic coming over the Eleventh Street Bridge going to Anacostia would turn right into either one of those roads, both of which take only southbound traffic; is that correct, sir? A. Well, the northernmost of the two roads, I believe, circle around, and I am unable --

THE COURT: The question is: Is it one way?

THE WITNESS: It is one way, Your Honor. Both roads are one way.

MR. GRAHAM: Thank you.

* * * * *

32 MR. ZITOMER: There was a statement made earlier about one of the roads being one way, Your Honor. And I would like to make it clear that it is only one of the roads, that is, the one going towards Nichols Avenue

is the only one-way road shown in the scene. And for that purpose, I would
33 like to call Delores Robinson, who is the plaintiff in this case, who
was familiar with the scene before and after the accident.

THE COURT: You want to do what?

MR. ZITOMER: I want to show the fact that one of the roads depicted
in that intersection is a two-way road.

THE COURT: You can ask that of the officer when you have him to-
morrow.

MR. ZITOMER: Yes, Your Honor. I can very well.

THE COURT: Personally, I think that sort of thing ought to be as-
certained and stipulated. Those are matters of record, whether a particular
street is one-way or two ways, and so on. I don't think time ought to be
consumed in the courtroom trying to prove those facts of record.

MR. ZITOMER: I wanted to state it now because the statement had
been made earlier that --

THE COURT: It was stipulated that each of the two roads was one way.

MR. ZITOMER: Only one of the roads was one way.

THE COURT: I understood otherwise.

What is your understanding?

MR. GRAHAM: My understanding was that both of the service roads
turning off to the right were one-way streets.

34 THE COURT: That certainly is my understanding of the testimony
and the stipulation.

MR. ZITOMER: Eleventh Street, of course, is a two-way street.

THE COURT: Of course.

MR. ZITOMER: May I state, Your Honor, that if that was what Your
Honor understood, it was a misunderstanding.

THE COURT: What difference does it make in this case?

MR. ZITOMER: It might.

THE COURT: I don't know what you mean by "might." What difference
does it make? This accident didn't take place on the service road, did it?

MR. ZITOMER: No, sir.

THE COURT: Let us proceed. I am not going to let you waste the Court's time. Get the information and then you gentlemen can stipulate it. Get official information on that.

Let us proceed.

MR. ZITOMER: I am reading, Your Honor, the question -- Shall I read the question before the one at which I stopped in order to get continuity? Would I be permitted to read the last question which I had read before I broke off the reading, sir?

THE COURT: You may proceed.

* * * * *

35 MR. ZITOMER: (Reading)

"Question: Can you tell us where in particular the U. S. Naval Receiving Station is with reference to where the accident occurred?

"Answer: Well, at the time the accident occurred I was standing on the east side of Eleventh Street at the bus station, waiting for a bus proceeding north to take me into Washington, D. C. proper. There is a road leading from the main gate of the naval station on to Eleventh Street which intersects directly across the street from Eleventh Street where I was standing.

"Question: Is there any other road?

"Answer: There is also another road which comes in on the same point, the same side of the street as the road leading from the naval station.

"Question: Forming a fork?

36 "Answer: Forming a fork directly across the bus station where I was standing.

"Question: What was your position at the time?

"Answer: I was looking across Eleventh Street toward the intersection of these two roads we just mentioned.

"Question: Can you tell us what you were doing in the naval receiving station? What was your position?

"Answer: I was living there; I was quartered there as a member of the U. S. Navy.

"Question: Stationed there?

"Answer: Stationed there, yes.

"Question: Can you tell us when you first observed William Johnson, the man who was injured?

"Answer: A few minutes prior to the accident. I looked across Eleventh Street toward the intersection and I saw a colored man standing at the point where these two roads intersect with Eleventh Street.

"Question: Would that be the westerly side of Eleventh Street?

"Answer: Yes.

"Question: What did you observe him doing at that time?

"Answer: When I first observed him, he simply was standing there, not moving or looking in either direction, just standing at the curb.

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"Question: Did he eventually step off the curb?

"Answer: He did. He stepped without looking in either direction, directly off the curb and proceeded almost at right angles across Eleventh Street.

"Question: When you say almost at right angles across Eleventh Street, almost at right angles to what?

"Answer: To the side line of Eleventh Street.

"Question: Going directly across Eleventh Street?

"Answer: Crossing toward the easterly side of Eleventh Street.

"Question: And at no time did you see him look either to his left or right to observe traffic?

"Answer: He did not look either way, no.

"Question: Can you tell us what the traffic conditions were on Eleventh Street?

"Question: At this time.

"Answer: There were a number of cars. The traffic was moderately heavy.

"Question: Going back to the point of Mr. Johnson standing before he stepped off to cross Eleventh Street: Can you describe the point

38

"along Eleventh Street with regard to the two other streets which you mentioned, the one going to the main gate and the other going in the other direction, making a fork in the road?"

"Answer: He was standing at that point where these two other streets, the one leading to the main gate of the naval station and the other street which I believe leads to Anacostia, intersect with the westerly side line of Eleventh Street.

"Question: Do you know whether or not this is a customary place for people to cross Eleventh Street?"

MR. GRAHAM: There is objection interposed there, Your Honor. I object to the question as calling for a conclusion on the part of the witness.

THE COURT: Objection sustained.

MR. ZITOMER: May I state, Your Honor, at the bench, the answer given in the question for the purposes of the record only?

THE COURT: It is there. You don't have to read it. It is in the record. It is in the file, so you don't have to make a tender of proof like you would if the witness were on the witness stand.

MR. ZITOMER: (Reading)

"Question: Is there any other place in that area where persons normally cross Eleventh Street?"

MR. GRAHAM: I object to the question on the ground --

THE COURT: Objection sustained.

* * * * *

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MR. ZITOMER: * * * (Reading)

"Question: Is there any other area on Eleventh Street where it would be customary within the immediate range of a half mile on either side?"

MR. GRAHAM: I object to the question again.

THE COURT: Sustained.

MR. ZITOMER: Same objection, Your Honor? May I preserve the same objection?

THE COURT: As a matter of fact, the witness said, in effect, "I don't

know." You should skip that question. Just look at the witness's answer. He didn't answer the question.

You may proceed.

MR. ZITOMER: He does answer the question, Your Honor, I believe, in a portion.

THE COURT: "I am not familiar with them." That is as good as saying, "I don't know."

Move along. Proceed with the next question.

MR. ZITOMER: May I preserve the answer in the record for the purposes of the record?

40 THE COURT: Proceed with the next question. I have told you before that the deposition is in the file.

MR. ZITOMER: (Reading)

"Question: You don't know of any others?

"Answer: I do not.

"Question: Now, you stated that you did not observe Johnson look either to the right or the left at the time he stepped off or before he stepped off the curb. Did you see whether or not he looked either to the right or to the left at any time while he was in Eleventh Street crossing the intersection?

"Answer: As I watched him cross the street, I did not see him look in either direction. He simply walked straight ahead toward the easterly side line of Eleventh Street without looking in either direction.

"Question: Now, you stated that you were waiting for a bus and facing Johnson making your observations. Did you continuously observe Johnson until the time of the accident?

"Answer: I did until the time the truck came between me and Johnson, a second or two before he was hit.

"Question: Can you tell us whether Johnson was walking across the street in a rapid pace?

41 "Answer: He walked across at a slow gait, particularly for one crossing such a busy street; a steady pace. He didn't slow or speed

"up at any time once he started to cross. It was the same slow gait from the beginning until he was hit.

"Question: Could you tell us approximately how much of Eleventh Street he had covered before the accident occurred?

"Answer: He had crossed the southbound lane of traffic of Eleventh Street and had reached the center and had gotten just beyond the center when he was hit by the truck.

"Question: In other words, he had gone over half the distance across the road?

"Answer: Just over half, I would say, yes.

"Question: You mentioned that before . . ."

* * * * *

"Question: You mentioned that he stood at the curb of Eleventh Street for some time. Can you tell us how long a time?

"Answer: When I first observed him he was standing there on the curb of Eleventh Street. As I remember it, it was a few moments before he proceeded across.

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"Question: That would be a few minutes?

"Answer: It could well have been a minute or two. I don't know how long he stood on the curb or how long he was there before I saw him.

"Question: Is it a time that you measure in a matter of minutes rather than seconds?

"Answer: I would say he was there a few minutes rather than a few seconds, yes. I think it was one or two minutes at least before he started to cross.

"Question: How much time would you say it took him to traverse the area of Eleventh Street from the curb line to the point where there was an impact?

"Answer: From the time he started to cross?

"Question: From the time he started to cross until the time of the collision.

"Answer: It would be in terms of seconds, I would think. I really

"don't know. Whatever time it takes someone walking in a slow gait to reach the center of that street.

"Question: Can you tell us how wide . . . "

* * * * *

43 MR. ZITOMER: * * * May I continue to read, Your Honor?

THE COURT: No; you will skip the rest of that page, because that is repetitious.

44 MR. ZITOMER: Continuing on page 10, at the top, Your Honor, of the deposition. (Reading)

"Question: You say he travelled over half the distance. Can you give us an idea in terms of feet how much he travelled?

"Answer: I would say he travelled, if Eleventh Street is fifty feet wide, I would say he travelled approximately thirty feet, possibly, twenty-five to thirty feet.

"Question: Tell us when you first saw the truck which was involved in the collision?

"Answer: A few seconds before the impact. I was looking at the pedestrian just prior to the impact when the truck came into my line of vision. I don't recall turning.

"Question: Was there anything which brought your attention to the truck?

"Answer: I heard him honk his horn and at that time I did look and saw the truck. This was still prior to the impact.

"Question: And it was a matter of seconds before the impact?

"Answer: I would say it was a matter of seconds after that.

"Question: Can you tell us how far the truck was at the time that you observed it the first time . . . "

45 THE COURT: He said he doesn't know to that question. There is no use reading a question to which he gives an answer, "I don't know." He says, "I don't think I can tell you."

And the same applies for the question after that.

I suggest you commence reading with the first answer on page 11.

MR. ZITOMER: Did I understand Your Honor to say that I should continue to read after the first answer on page 11?

THE COURT: No. My suggestion is that you resume reading with the first answer on top of page 11, because the intervening material just says, "I don't know," "I don't know," or it would be a guess.

MR. ZITOMER: The top of page 11, reading at the first answer that appears there. (Reading)

"Answer: I heard the truck sound its horn and that brought my attention to the truck and I looked at the truck and how far after that it travelled before it hit the victim, it is difficult to say.

"Question: Did you have to turn your head in order to see the truck?

"Answer: I did, yes."

* * * * *

46 MR. ZITOMER: Beginning on page 12, Your Honor, at the question "The first time you saw him," the question is, "The first time you saw him," referring to the truck, Your Honor.

"Answer: The truck was to my left when I first looked at it a few seconds before it hit the man. I had to look toward the south, a generally southerly direction to see the truck and I did that, as I remember, when the horn started. Primarily I was focusing my attention on the pedestrian crossing.

"Question: Would you tell us where he was in relation to either side of Eleventh Street or the point of impact at the time that you first observed the truck?

"Answer: He was in the southbound lane of traffic on Eleventh Street.

47 "Question: And he was injured in the northbound lane?

"Answer: Just over the center line, right. He hadn't yet reached the northbound lane of traffic when the truck blew its horn and I first saw the truck. As near as I can recall, he was just about at the center of the road of approaching the center of the road.

"Question: Did you observe him doing anything?

"Answer: No. He did not react to the horn blowing at all. He continued at the same slow gait across Eleventh Street.

"Question: What was his appearance at that time? Did he look to the right at that time?

"Answer: No. He appeared unaware of his surroundings or the traffic conditions; dazed, in a sense.

"Question: Did he appear to be in possession of his faculties?

"Answer: He looked dazed. He certainly had the use of his arms and legs at the time. He was walking.

"Question: I am talking about his faculties, his sensory faculties. Did he indicate any use of the faculty of hearing? That is, was there any reaction?

48

"Answer: He did not react in any way to his surroundings or attempt to take cognizance of the traffic conditions at the time. He did not respond to the blowing of the horn by the truck driver.

"Question: He never changed his pace?

"Answer: He never changed his pace. He never tried to look around. He never changed the expression or his appearance in any way.

"Question: The expression on his face?

"Answer: Yes.

"Question: How about his eyes?

"Answer: I don't believe I was close enough to see his eyes.

"Question: We are talking about the condition of the man after the horn blew. Is that correct?

"Answer: His condition did not change from the time I saw him until he got hit. The horn blowing or anything else did not seem to make any change in his appearance or his manner of walking.

"Question: Can you tell us what happened from the time that the horn blew until the time of the accident?

"Answer: The pedestrian continued to walk in the same gait. He didn't stop or speed up. He continued directly across toward the easterly side of the street.

49

* * * * *

"Question: What were your observations as far as the truck was concerned?

"Answer: When I first saw the truck it wasn't travelling at a very fast rate of speed for that area.

"Question: Can you estimate that speed?

"Answer: Twenty-five miles an hour, perhaps. The truck perhaps slowed down a bit, but I am not certain after the time he blew the horn and the time the impact was made. He wasn't going too fast to begin with. He wasn't going fast when it hit the man.

"Question: Can you tell us what happened following the impact?

50

"Answer: I could hear the pedestrian hollering and the truck backed up a few feet to enable the pedestrian to free his foot or body from the truck. Just at the time the pedestrian got hit the front of the truck came between me and the pedestrian, so I actually could not see the pedestrian at the time impact was made. I could hear him scream.

"Question: Was this just after your observation was cut off that he screamed? Can you give us an idea of the time?

"Answer: Just a second after or so, the truck came between me and the pedestrian. He yelled and I saw the truck back up.

"Question: Where did the truck come to a halt?

"Answer: In regards to the pedestrian?

"Question: In relation to the pedestrian or the line of walking across Eleventh Street?

"Answer: The part of the truck which made impact with the pedestrian was around the left front wheel area, the side of the truck at the left front wheel. From seeing the pedestrian after the accident, I would say that it was his foot that was under the wheel that had been trapped there.

"Question: Under which wheel?

"Answer: Under the left front wheel and that the truck backed off to enable him to free his foot.

51

"Question: So the truck came to a halt practically at the time of the impact. Is that correct?

"Answer: Yes.

"Question: Or a matter of seconds?

"Answer: It travelled very few feet after it hit the man, if any. The truck stopped very shortly after the point of the impact.

"Question: Going back to the situation just prior to the impact, you were unclear as to the rate of speed that the truck was travelling. Could you tell us what happened insofar as the rate of speed of the truck from the time that you first heard the horn until the time of the impact?"

MR. GRAHAM: There was an objection and a clarification.

THE COURT: The objection is -- I have to read it. (Reading)

"I have to object to the question because I believe the witness did state a definite speed for the truck . . ."

THE COURT: I am going to sustain the objection to the preliminary part of the question, to counsel's statement. But the question itself will be admitted.

52

Now you may proceed and read the answer.

MR. ZITOMER: (Reading)

"Answer: The truck certainly did not speed up. It is quite possible it decreased its speed somewhat. So it was going no more than that, if it was twenty-five when it hit, and very likely something less than that.

"Question: Was the variance in speed insignificant enough so that it did not register with you?

"Answer: There was no screeching of brakes or any skidding on the part of the truck. It was going at a slow enough speed so that when the impact was made it could stop almost instantaneously without travelling another two or three feet.

"Question: Did the driver of the truck sound his horn or do anything else by way of signaling before the impact the first time you observed it?

"Answer: No, I heard only the blowing of the horn.

"Question: Can you tell us what happened after the impact? What did you observe with regard to the victim and with regard to the truck or its driver?

53 "Answer: The first thing I remember, of course, was the victim hollering, which was quite loud. The truck moved back freeing the victim, who then -- although I couldn't see him -- proceeded along the outside side of the truck to the rear and around the rear of the truck to the curb where I then again could see him, but he did that under his own steam without assistance. At the time the truck driver got out and as I remember he had already reached the curb by proceeding along the side and the rear of the truck. He sat down and held his foot, the lower part of one of his two legs.

"Question: What did he say or do? What was his appearance like?

"Answer: He said nothing. Questions were asked of him but he did not seem to respond. I don't remember him giving any answers, neither his name nor his address. He was obviously in pain and was making some groaning noises. Other than that I don't think he said anything, although direct questions were asked of him.

"Question: Was this man eventually removed from the scene of the accident?

"Answer: He was.

"Question: Could you tell us by what method he was removed?

54 "Answer: An ambulance came. A stretcher was taken from the ambulance and he was placed on the stretcher and the stretcher was put in the ambulance.

"Question: Were the police also on the scene?

"Answer: The police were there a few minutes after the accident happened and prior to the ambulance coming.

"Question: How long after would you say the ambulance arrived?

"Answer: I would say no longer than ten minutes; the police within five minutes.

"Question: Did he remain in the same position on the side of the road?

"Answer: He sat on the curb on the side of the road. He took his shoe off or someone assisted him. He was holding that part of whichever foot was injured and he remained in that position until he was put on the stretcher.

"Question: When the police arrived did they attempt to question him?

"Answer: They did.

"Question: Were you there?

"Answer: Yes, sir.

"Question: Did he respond to the questions of the police?

"Answer: I do not remember him responding or giving any answers to the police, to their questions."

55 That completes, Your Honor, the reading of this deposition.

* * * * *

MR. ZITOMER: I have next Mrs. Delores Robinson, who is the plaintiff in this case, to testify as to certain aspects of liability.

THE COURT: Will her testimony go to liability or damages?

MR. ZITOMER: Your Honor indicated you wanted to hear only evidence of liability at this point, and this was my intention, and to call her at a later time on the evidence of damages.

THE COURT: We will recess at this time until tomorrow morning. But I do want to inquire, what kind of testimony do you expect to elicit from her as to liability?

MR. ZITOMER: I expect to show, Your Honor, that the decedent, William Johnson, had an eye condition for which he wore eye glasses, that the evidence will further show at this time he was not wearing his eye glasses.

* * * * *

58

FRED L. BARBER

called on behalf of the plaintiff, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

Q. Will you state your full name and your address, sir? A. Fred L. Barber.

* * * * *

Q. Are you a member of the Metropolitan Police Force? A. I am, sir.

Q. Attached to the Accident Investigation Unit? A. That is correct, sir.

* * * * *

59 Q. Officer, were you attached to the Accident Investigation Unit on August 15th of 1957? A. I was, sir.

Q. Now, on that day, sir, did you have occasion to receive a notice of an accident that had occurred at the south end of the Eleventh Street Bridge? A. I did, sir.

Q. Is that the accident involving a truck belonging to the City Express Company and involving a pedestrian named William T. Johnson? A. That is correct, sir.

Q. What did you do after receiving notice of this accident? A. We received a radio call to investigate this accident and we immediately proceeded to the scene; where, upon arriving at the scene, we located this truck that you mentioned before, the City Express, and found it had been involved in an accident with a pedestrian, later identified as William Johnson.

Q. Now, Officer, I show you what has already been marked as Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3. Is that the truck that was involved? A. Yes, sir.

* * * * *

60 Q. Officer, did you make an examination of the vehicle, the truck that I just showed to you? A. Yes, sir.

Q. What did you find? A. We established the point of impact on the vehicle to be on the left front bumper, the wheel and the edge of the side view mirror.

* * * * *

61 Q. Officer, I am going to ask you now to identify by marking on Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3, with the Court's permission, those portions of the truck which were found to have been in contact with the pedestrian.

* * * * *

Q. Will you draw a circle around those points on the truck?

62 (The witness marked the exhibit.)

Q. Now a similar marking on No. 2? A. That would be in this area here, this area here.

(The witness marked the exhibit.)

* * * * *

Q. Officer, could you determine how far the point of impact was from the nearest curb? A. I did, sir.

* * * * *

Q. What was the point of impact from the nearest curb? A. The point of impact was established to be 70 feet south of the south curb of the roadway leading to Anacostia Drive.

* * * * *

63 Q. The question is, sir, how far from the nearest curb, the nearest curblane? A. The nearest curblane, that was established as being 8 feet 2 inches west of the east curb of Eleventh Street.

* * * * *

64 MR. ZITOMER: May I have him simply put a dot, Your Honor, at that curb which he just referred to?

* * * * *

(The witness marked the exhibit.)

* * * * *

BY MR. ZITOMER:

Q. Officer, were you able to determine the height of the mirror which is seen -- that is, the side-view mirror seen on the truck, which is shown in Plaintiff's Exhibit No. 2? Were you able to determine the height of that mirror above the ground? A. I do not have that measurement.

Q. Do you have any recollection, Officer, of the approximate height of that mirror? A. I would say about the average height of a person.

65 Q. Now, did you find any marks upon the vehicle indicating the impact and, if so, will you describe what you saw? A. The impact, as I stated before, was located on the left front bumper, a brush mark on the bumper; there were abrasion marks on the tire of the left front wheel

and on the bottom side of the rear-view mirror. There was no damage to the vehicle.

Q. Did you attempt to examine the mirror to determine how tightly it was affixed to the vehicle? A. I don't recall that, no, sir.

Q. Can you identify the construction of that mirror which you examined and have just referred to? A. I am afraid I couldn't.

Q. I'm sorry, I didn't understand you. A. I cannot describe the dimensions and so forth, no, sir.

Q. Can you describe what the material is of which it's made? A. It's made of metal, yes, sir.

Q. Officer, how long have you been a member of the Accident Investigation Unit? A. Approximately eleven years, sir.

Q. And as a member of the Accident Investigation Unit do you have occasion to determine the average reaction time of a driver to danger; that is, the time that it takes the driver to react to a danger to the time that he applies his brakes effectively? A. We have a rule of thumb method in which to determine reaction time, yes, sir.

* * * * *

Q. What is the average time that it takes for a normal operator, driver of a vehicle, from the time that he recognizes danger until the time that he effectively applies his brakes?

* * * * *

67 MR. GRAHAM: I am going to object to that.

* * * * *

MR. GRAHAM: The objection is that it goes beyond the scope of this witness' qualifications.

THE COURT: I am inclined to sustain the objection.

MR. ZITOMER: May I ask the Officer for the qualifications and experience?

THE COURT: We know he has had experience investigating accidents, but reaction time is a question of psychology, a mental operation, rather than any physical matter. I think I will ask the officer.

Is it within your duties to try to estimate the reaction time of a driver?

THE WITNESS: We are required to give an opinion.

THE COURT: You are?

THE WITNESS: Yes, sir.

THE COURT: And have you done it in the past in other cases?

THE WITNESS: The rule that we have been following is --

68 THE COURT: No; have you given an opinion in other cases?

THE WITNESS: In court, sir?

THE COURT: In court or otherwise, or in your reports.

THE WITNESS: I have, sir.

THE COURT: I think he is qualified. I will overrule the objection.
I will let him answer.

BY MR. ZITOMER:

Q. Will you state the answer there, Officer? A. The average is
three-quarters of a second.

* * * * *

69 Q. How fast does a truck travel in terms of feet per second at the
speed of 25 miles an hour? A. Well, using the method that I mentioned
before, that would be approximately 37 feet per second.

* * * * *

70 Q. What is the average walking speed of the average pedestrian upon
the streets of this city?

MR. GRAHAM: I object to that.

THE COURT: Objection sustained. Different people walk at different
speeds. I walk fast, some people walk slowly, and the testimony in this case
is that the speed of the pedestrian was characterized.

[BY MR. ZITOMER:]

Q. What, Officer, would be the speed of a pedestrian walking at a
slow gait?

MR. GRAHAM: I object to that question.

THE COURT: Objection sustained. What one person considers slow
another person may not consider slow. This is too indefinite.

* * * * *

72 THE WITNESS: On the left front wheel there were four feet of skid, on the left rear there were 30 feet, on the right rear there were 18 feet, there were none on the right front.

* * * * *

73 BY MR. ZITOMER:

Q. Officer, will you take this pencil and draw a circle around each of the skid marks of the respective wheels that you have identified? Next to that circle I am going to ask you to draw the symbols LF for left front and RF for right front and so forth.

(The witness marked the exhibit.)

Q. Do you see the right front marks there, sir? Do I understand then, Officer, that the right front mark does not show on this photo but the other marks do? A. That is correct, sir.

Q. Before I exhibit this photo to the jury and with the Court's permission, I am going to ask you to place an X where you determined on this photograph the point of impact was.

(The witness marked the exhibit.)

(The exhibit was handed to the Court.)

* * * * *

74 MR. ZITOMER: Now with your Honor's permission may I have him
75 put a GH on what he has identified as Good Hope Road?

THE COURT: Yes, that might be a good idea.

(The witness marked the exhibit.)

BY MR. ZITOMER:

Q. Now, Officer, will you indicate the other road just in front of that?
A. This would be the roadway leading to Anacostia Drive.

Q. Would that properly be called Anacostia Drive? A. It could be, yes, sir.

Q. Would you draw the letter, the symbol A in the middle of that road?

(The witness marked the exhibit.)

* * * * *

76 Q. Officer, will you state that point where these two streets come

together, that is, the street going to the main gate and the other going down to the river; the main gate, that is, of the Anacostia Naval Receiving Station? Now, is there a curb at the point where the road leading to Anacostia Receiving Station and the one leading down to the river come together? A. At this point here, sir, (indicating).

Q. Now, I am going to ask you, Officer, with the Court's leave, to place a W at that point.

(The witness marked the exhibit.)

* * * * *

Q. Can you tell us, Officer, whether the distance from the point which you have marked as W to the opposite side of 11th Street is greater than 35 feet? A. I don't have that measurement, but I would say it is, yes, sir.

* * * * *

79 MR. ZITOMER: Your Honor, we have this much of a concession, and that is Mr. Graham will stipulate that Mr. Hirshman would testify to the width.

THE COURT: I think that is enough.

MR. ZITOMER: And that testimony, Your Honor, would be that the distance is 46 feet.

THE COURT: Very well.

MR. GRAHAM: That is not a complete stipulation. It's 46 feet from Point W to the east side of 11th Street.

THE COURT: Well, I so understood. Now is there anything further?

MR. ZITOMER: Yes, Your Honor, I want to ask Officer Barber whether or not there is a sidewalk which leads to Point W.

80 THE WITNESS: There is, sir.

BY MR. ZITOMER:

Q. And where does the sidewalk run from Point W? A. It goes down in front of the Receiving Station.

Q. And is there not another sidewalk going along Anacostia Drive from Point W? A. I believe there is, yes, sir.

Q. What is the general direction of the sidewalk from Point W down Anacostia Drive? What angle does that sidewalk make approximately with

11th Street? A. About a 45 degree angle, I would say.

THE COURT: What was your answer, Officer?

THE WITNESS: About a 45 degree angle.

* * * *

CROSS-EXAMINATION:

* * * *

81 BY MR. GRAHAM:

Q. Officer, do you have with you your PD-10, the official report of this accident which you filed with the Police Department? A. I have a copy, yes, sir.

Q. And did you prepare that report yourself? A. I did, sir.

Q. According to your report what time did the accident occur?

* * * *

82 THE WITNESS: 10:15 a.m.

BY MR. GRAHAM:

Q. And His Honor has suggested the next question. What time did you receive the radio call? A. At 10:10 a.m.

THE COURT: What time did you arrive at the scene?

THE WITNESS: Approximately 10 minutes later, Your Honor.

* * * *

BY MR. GRAHAM:

Q. Had the pedestrian been removed from the scene to the hospital when you arrived there? A. He had, sir.

* * * *

83 Q. And do you have a recollection, sir, of trying to ascertain from her where Mr. Johnson was employed, if he were employed?

THE COURT: I think that that is beyond the scope of the direct examination.

84 MR. GRAHAM: For this purpose, Your Honor, I will make this Officer my own witness.

THE COURT: And how long will that be? Ordinarily, I don't like to permit that if it will consume any length of time. On the other hand, if it will save the Officer returning I will let you do this.

MR. GRAHAM: Yes, it will. All I want to do is to have him tell us where the man was employed, if he were employed.

THE COURT: He may answer that.

* * * * *

BY MR. GRAHAM:

Q. Officer, did you ascertain where Mr. Johnson was employed, if he were employed? A. I have indicated here that he was unemployed.

* * * * *

86 Q. Did I understand you to say, Officer, that there was no observable physical damage to the truck? A. That is correct, sir.

Q. When you mentioned the establishment of the point of impact on the truck, how did you establish that? A. By the brush marks on the various parts of the vehicle as I have so indicated.

Q. By brush marks do you mean where the road film had been brushed off? A. That is correct.

* * * * *

88 Q. Officer, in connection with the skid marks which you observed, is it not true that the front wheels of the truck were single tires while the rear wheels had dual tires? A. That is correct, sir.

Q. And the dual tire skids were 18 feet on the right and 30 feet on the left, is that correct, sir? A. That is correct, sir.

Q. And that both tires were applied?

THE COURT: If you will permit me to interject a question at this point.

MR. GRAHAM: Yes, sir.

THE COURT: Can you draw any inference from the length of the skid marks as to the speed of the truck, or not?

THE WITNESS: No, sir, I wouldn't be able to draw that without a test skid.

THE COURT: Thank you.

BY MR. GRAHAM:

Q. And is it not true, Officer, that the skid marks of the truck veered to the right, toward the righthand curb? A. That is correct, sir.

89 Q. And did the driver tell you he turned to the right when he saw the pedestrian?

MR. ZITOMER: I object again, Your Honor. It is a self-serving declaration.

THE COURT: Objection sustained.

* * * * *

90 BY MR. GRAHAM:

Q. Officer, you have now prepared a diagram of Anacostia Drive, 11th Street and Good Hope Road, is that correct, sir? A. Yes, sir.

Q. And is north to the top of the diagram? A. That is correct, sir.

Q. Now, in the area between Anacostia Drive and Good Hope Road you have drawn a double line which you have marked sidewalk. Will you point out the sidewalk to the Court and ladies and gentlemen of the jury? A. Here (indicating).

Q. Does that sidewalk circle the entire area there of Good Hope Road and Anacostia Drive? A. I believe it does, yes, sir.

* * * * *

91 Q. Now, would you please take a piece of chalk, sir, and point out to the Court and ladies and gentlemen of the jury the approximate point of impact which you have said was 70 feet south of the south curb of Anacostia Drive?

(The witness marked the map.)

Q. Now, would you draw a line and put 70 feet in, from where you made your measurement?

(The witness marked the map.)

* * * * *

Q. Officer, in connection with your duties as a member of the Metropolitan Police Department are you required to ascertain and report to your superior officers on pedestrian knockdown cases whether or not the point of impact occurred at a place when the pedestrian was in a crosswalk?

MR. ZITOMER: I object to the form of the question, Your Honor.

THE COURT: Objection overruled. This is a preliminary question.

You may answer. The question is whether you are required to report on that point.

92 THE WITNESS: Yes, sir.

BY MR. GRAHAM:

Q. And did you so report on your PD-10 form? A. I did, sir.

Q. And would you tell the Court and the ladies and gentlemen of the jury whether or not your investigation disclosed whether the pedestrian was or was not in a crosswalk at the point of impact?

MR. ZITOMER: Your Honor, may I record an objection to this as calling --

THE COURT: On what ground?

MR. ZITOMER: As calling for a conclusion of law on the part of the witness.

THE COURT: I think it is a fact rather than a conclusion whether the point of impact was in a crosswalk.

MR. GRAHAM: Yes, sir.

THE COURT: If you reframe your question to ask it that way I will allow it.

BY MR. GRAHAM:

Q. Was the point of impact as observed by you within a pedestrian crosswalk? A. No, sir.

MR. GRAHAM: I have no further questions, Your Honor.

93 MR. ZITOMER: Your Honor, I would like to ask the witness now pertinent questions with regard to his definition of a crosswalk as he understood it at the time.

THE COURT: You have a right to redirect examination.

REDIRECT EXAMINATION

* * * * *

94 BY MR. ZITOMER:

Q. Officer, you testified -- what was your understanding of an unmarked crosswalk at the time you put that record down in your police statement? What was your definition of an unmarked crosswalk? A. I can better illustrate it on the board, if I may.

THE COURT: You may do so.

MR. ZITOMER: May I ask him first, Your Honor, because the words are important here?

THE COURT: Very well, you may proceed in your own way.

THE WITNESS: It's the imaginary continuation of the curblin intersecting at the intersection.

BY MR. ZITOMER:

Q. Now, what is the definition of an intersection, according to your understanding, at the time this report was made? A. The intersecting cross lines of one or more highways.

Q. And was it not your understanding at that time that in order for there to be an intersection the roads had actually to cross one another? A. Would you repeat that, please?

95 Q. Was it not your impression or belief at the time you made your report that an intersection required that the roads cross?

MR. GRAHAM: If Your Honor please, at this time I am going to object to the attempt of the attorney to impeach his own witness.

THE COURT: I am going to sustain the objection. I want to say this, gentlemen, too: of course, the Court cannot take judicial notice of regulations and the regulation in question has not been offered in evidence as yet, but perhaps it might help counsel if I call counsel's attention to the fact that if and when that particular regulation should be offered in evidence it will indicate that an unmarked crosswalk has to be at an intersection and cannot be between intersections.

MR. ZITOMER: Indeed, Your Honor. Now we are prepared to show by the offering of this evidence that this is an intersection under the law because by reference to definitions in Your Honor's volume --

THE COURT: Very well, but you may not impeach your own witness.

MR. ZITOMER: May I point out to Your Honor that Mr. Graham said he was making the Officer his own witness for the purpose --

96 THE COURT: He was making the Officer his own witness only as to certain interviews that the Officer was supposed to have had with the

relatives of the deceased, and after he did so I sustained your objection to that because it was hearsay. But these matters were within the scope of the direct examination; therefore, there was cross-examination of your witness.

* * * * *

(AT THE BENCH:)

MR. ZITOMER: Your Honor, I expect to elicit on the cross-examination of this witness --

THE COURT: The cross-examination?

MR. ZITOMER: On the examination of this witness.

THE COURT: You mean redirect examination.

MR. ZITOMER: On the examination of the witness.

97 THE COURT: It isn't what you expect to elicit. Put the question on the record and state what answer you expect to elicit. A tender of proof has to be precise.

MR. ZITOMER: I would ask the Officer whether he and I had a discussion shortly following this accident, by a matter of weeks following this accident, at which we went over his report and discussed it, and at that time did the question of whether this was a crosswalk enter into our discussions. The Officer would reply, I would expect that he would reply that at that time he told me that his understanding was it was not an intersection because the roads did not cross, that he thought that an intersection required that two roads must cross. Then I pointed out to him the regulations --

THE COURT: No; what you said --

MR. ZITOMER: I would then -- that that was his impression, and it was because the roads did not cross that he did not think that that was an intersection. That when I pointed this out to him he then changed his mind concerning the definition -- concerning the fact of the crosswalk.

This is the reason why I recorded an objection to what was on the record, because the Officer was under a mistaken impression.

THE COURT: Just a moment. Confine yourself to the tender of proof and not argument.

98 MR. ZITOMER: I expect that he would so testify, as I have said.

THE COURT: That he would testify what?

MR. ZITOMER: That he would testify that at the time he made the report, that he thought this was not an intersection, but that the record, the laws having been brought to his attention, he realizes that they were an intersection; that this would have changed his impression.

THE COURT: Why don't you ask him the direct question instead of asking him what he said to you many months ago? Ask him if this is an intersection. Don't beat about the bush or run around Robin Hood's barn. Just ask him whether this is an intersection.

MR. ZITOMER: I wanted to point out that his opinion was -- what his opinion as to a crosswalk was based upon.

THE COURT: I don't care what his opinion was two years ago. Just ask him the direct question.

MR. ZITOMER: I would expect --

THE COURT: Ask him the direct question.

MR. GRAHAM: May I point out, Your Honor --

THE COURT: What is the use of multiplying possibilities of future controversies?

MR. GRAHAM: All right, sir.

THE COURT: Go ahead and ask him the question.

99 (IN OPEN COURT:)

THE COURT: Now let's move along a little faster.

BY MR. ZITOMER:

Q. Officer, upon what was your opinion as recorded in the police officer's report that this was not a crosswalk based? A. What was my opinion, you say?

Q. Upon what was it based? A. Well, I did so indicate that it was an intersection, but I did so indicate on here that the deceased was not in a crosswalk.

Q. And upon what, sir, was that opinion which you expressed there based? A. By the crosswalk extending on the east side of Good Hope Road; the imaginary line of that crosswalk extending across 11th Street would be

at an angle where the point of impact would be south of that area. I can better describe that if you permit me to go to the board.

* * * * *

100 THE WITNESS: To establish the unmarked crosswalk at this particular intersection where Good Hope comes into 11th Street you would take the continuation of this curbline here to the point of where it intersects with the east curb of 11th Street; and if there is a concrete walk here you would take the width of that walk, the line there would extend to where it intersects with the east curb of 11th Street. That would be the unmarked crosswalk.

* * * * *

BY MR. ZITOMER:

101 Q. Officer, as I understand your evidence, that a pedestrian crossing between those two points would have to cross at a diagonal to the traffic in order to be in the crosswalk?

* * * * *

Q. That is correct, sir; that is, to comply with the traffic regulations.

Q. Now, Officer, assuming -- may I ask you for the crosswalk, sir. between Anacostia Drive and this point of 11th Street? Will you come down here, Officer, if you would, and indicate the crosswalk of that point?

MR. GRAHAM: Your Honor, I am going to object to this unless it be established that there was a marked crosswalk there.

THE COURT: Are you referring, Mr. Zitomer, to an unmarked crosswalk or a marked crosswalk?

MR. ZITOMER: An unmarked crosswalk, Your Honor.

THE COURT: With that limitation I think he may answer.

MR. GRAHAM: If Your Honor will look at the traffic regulations you must have sidewalks on each side of the street.

THE COURT: I understand. I am going to allow the question.

(The witness approached the blackboard.)

THE COURT: You may answer, Officer.

THE WITNESS: This curbline here --

102 BY MR. ZITOMER:

Q. No; take the side that you are now on and project the crosswalk to the opposite side. A. Here (indicating).

Q. Now, sir, is not the bus stop, Officer, is not the bus stop opposite -- very close nearby that crosswalk that you have just indicated?

MR. GRAHAM: If Your Honor please, I am going to object to the form of the question.

THE COURT: Read the question. I might say, Mr. Graham, there is no requirement of curbs or sidewalks in order to form an unmarked crosswalk. I am referring to the definition of crosswalk, Mr. Graham.

Will you read the question?

(The last question was read by the Reporter.)

THE COURT: I will let him answer.

THE WITNESS: It is within this vicinity (indicating), but what the measurement is, I don't have that.

* * * * *

104 BY MR. ZITOMER:

Q. And, Officer, is not that bus station located directly opposite Point W? A. It would be in that area.

* * * * *

105 EUGENE BUSH

called on behalf of the Plaintiff, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

* * * * *

106 Q. Mr. Bush, what is your place of business? A. I have a furniture refinishing shop, Genie's Art Work Shop.

* * * * *

Q. How long did you know Mr. Johnson? A. I'd say approximately 25 or 30 years.

Q. Was he in your employ? A. He was.

Q. Now, for what period of time was he in your employ? A. He started in '54 and left in the middle of 1956.

107 Q. Now, Mr. Bush, while you knew Mr. Johnson did you have occasion to observe whether he had any defect of the eye? A. Yes, sir.

Q. Will you tell the Court and jury how you came to observe that?
A. Well, he had a pair of old glasses which he kept together with adhesive tape, and his work started to decline and I insisted that he buy new glasses. He didn't have the money so I sent him down and bought the glasses and deducted a couple dollars a week from his salary.

* * * * *

108 Q. What did you observe of this witness' eyesight or defects? What prompted you to suggest glasses to him? A. Because his type of work was declining, he couldn't see good enough.

Q. How did this manifest itself? How was it apparent? What particular work was he unable to do? A. Very fine veneer laying, very fine repairing.

* * * * *

109 DELORES ROBINSON

Plaintiff herein, assumed the witness stand, and having been duly sworn, was examined and testified as follows:

* * * * *

110 THE COURT: * * * You do not have to prove that she is the administratrix.

DIRECT EXAMINATION

BY MR. ZITOMER:

* * * * *

Q. What relationship are you to William T. Johnson? A. His third daughter.

* * * * *

111 Q. Did you come to know whether your father had any defect of his vision?

* * * * *

112 Q. What particular problem did he have with respect to his eyesight?

A. He had to pull the paper close up to him so that he could see.

* * * * *

Q. Do you know whether he habitually wore glasses? A. When he was working or reading.

Q. Do you know whether he wore glasses when he was not working or reading, that is, just walking? A. No.

Q. Do you know that -- that is, do you know or don't you know?

A. When I would see him walking he wouldn't have his glasses on.

Q. On the occasion of this accident did you determine whether he was wearing glasses?

THE COURT: Whether he was what?

113 [BY MR. ZITOMER:]

Q. Whether glasses were found among his personal effects? A. I don't know. I didn't receive any.

* * * * *

119 Q. Mrs. Robinson, you are very familiar with the scene of this accident, are you not? A. Yes.

120 Q. Were you familiar with it at the time of the accident? In 1957 you were familiar with the conditions that existed then? A. Yes.

Q. At that time did Anacostia Drive --

THE COURT: I can't hear you when you stand with your back to the Court and your voice travels into the rear of the courtroom.

[BY MR. ZITOMER:]

Q. At that time did Anacostia Drive and at the present time did Anacostia Drive -- is it a one-way or two-way street? A. Two --

THE COURT: I thought this was all stipulated yesterday.

MR. ZITOMER: Your Honor, I asked counsel for a stipulation. He refused, and so the only other recourse I have is to introduce evidence.

THE COURT: I thought it was stipulated that the two roads were one-way and that 11th Street of course is two ways.

MR. ZITOMER: I am a bit confused, Your Honor, as to whether there is a stipulation or not. I asked at the close of court yesterday as to whether he would stipulate to it, and he would not.

THE COURT: I don't think this witness is qualified to testify whether
 a particular street is one-way or two ways. Is there any dispute about those
 121 two streets being one-way?

MR. GRAHAM: Mr. Zitomer told me they were one-way, and I stipulated.

THE COURT: I thought you did.

MR. GRAHAM: Now he wants two ways.

THE COURT: I think you should have asked the police officer, he
 was here, if it is of any importance. I don't see its importance in this case.

MR. ZITOMER: Your Honor, I am asking this witness whether the
 fact is --

THE COURT: Mr. Graham is willing to stipulate the roads are one-way.

MR. ZITOMER: Your Honor, the point is that the street is two-way,
 not one-way, Your Honor.

THE COURT: I thought you claimed it was one-way.

MR. ZITOMER: No, Your Honor, I am asking this witness whether --

THE COURT: Just a moment. Now which street are you talking about?

MR. ZITOMER: Anacostia Drive.

THE COURT: Will it be stipulated it's two ways, or don't you know?

MR. GRAHAM: I don't know.

THE COURT: This witness certainly is not competent to answer that,
 122 is she?

MR. ZITOMER: Your Honor, if this witness is not competent, may
 I then ask whether the Court would allow the jury to go to the scene, and I
 will attempt to arrange transportation to take the jury to the scene?

THE COURT: No. This is the first time we have heard of Anacostia
 Drive. We have heard of 11th Street and Nichols Avenue. Now where is
 Anacostia Drive?

MR. ZITOMER: Anacostia Drive, Your Honor, is shown in the ex-
 hibits, Exhibit No. 6, as one of the two roads which intersect 11th Street.

THE COURT: What difference does it make for the purpose of this
 case whether it is two-way or one-way?

MR. ZITOMER: Your Honor, the issue has arisen, Mr. Graham has

stated that it was one-way. I think the truth of the matter should be disclosed.

THE COURT: I want to say this. The Court will assume that every street in this city is two ways until the contrary is shown, because the majority of streets are two ways. So, if any one of you wants to show it is one-way the burden of proof is on that party.

Now is there anything else you wish to ask this witness?

123 MR. ZITOMER: I simply -- do I understand, Your Honor, that I will not be permitted to ask this witness that question?

THE COURT: You are not listening to the Court. I said that the Court will assume that all streets are two ways until the contrary is shown. Doesn't that satisfy you?

MR. ZITOMER: Your Honor, I am confused by the requests for stipulations and I don't know how we stand as to Anacostia Drive.

THE COURT: The Court will repeat this a third time but no more. You claim this is a two-way street?

MR. ZITOMER: Yes, Your Honor.

THE COURT: The Court said that it will assume that all streets in the District of Columbia are two-way streets unless the contrary is proven. The contrary has not been proven as to this, so this is a two-way street. The Court assumes that because the great majority of all streets are two-way streets, so that anybody who claims that a particular street is a one-way street has to show it.

Now, anything further?

MR. ZITOMER: May I have just a moment, Your Honor?

THE COURT: Yes, indeed.

(Brief pause.)

MR. ZITOMER: I should like to read a portion of the deposition of the truck driver.

124 THE COURT: Yes, you may do so. You have to offer it in evidence before you can read it. Before you can read anything you have to offer it in evidence.

MR. ZITOMER: Your Honor, may I mark the deposition of the truck driver, Edward Irving Lynch, in evidence? May I offer the deposition of Edward Irving Lynch in evidence as the driver of the truck?

* * * * *

130 THE COURT: The entire deposition is in evidence, is that it?

MR. ZITOMER: I gather that the entire proceeding is in evidence, Your Honor.

THE COURT: You just don't care to take up the time of reading it out loud, but it is considered in evidence, is that it, gentlemen?

MR. GRAHAM: Yes.

MR. ZITOMER: Yes, Your Honor.

THE COURT: Very well.

131 MR. ZITOMER: Section 22(a) of the Motor Vehicle Regulations, Your Honor.

THE COURT: It may be admitted, and you may read it if you wish.

MR. ZITOMER: "No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care."

Section 52(a), Your Honor, entitled, "Pedestrian's Right-of-Way in Crosswalks."

THE COURT: It may be admitted.

MR. GRAHAM: I have an objection to 52(a), Your Honor. There is no proof introduced that the pedestrian was in the crosswalk.

THE COURT: Well, I will allow the regulation to be introduced and, of course, if the proof does not bring the plaintiff within the regulation, why, then there is no harm done.

MR. ZITOMER: "When traffic control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way,

132 "slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is travelling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger. No pedestrian shall suddenly leave a curb or other place of safety and walk or turn into a path of a vehicle which is so close that it is impossible for the driver to yield."

Section 54.

THE COURT: It may be admitted.

MR. ZITOMER: "Notwithstanding the foregoing provisions of this Article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

Section 57, if Your Honor please.

THE COURT: It may be admitted.

MR. ZITOMER: Titled "Crossing at Right Angles."

"No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb or by the shortest route to the opposite curb, except in a crosswalk."

133

* * * * *

MR. ZITOMER: Your Honor, I would like to read "Definitions," the definition for "Crosswalk" and the definition for "Intersection" under the Motor Vehicle Regulations.

THE COURT: You may do so. You mean you want to offer them in evidence?

MR. ZITOMER: Yes, Your Honor.

THE COURT: They may be admitted.

MR. ZITOMER: "Section 2. Definitions."

"Crosswalk - That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite

"sides of the highway measured from the curbs, or in the absence of curbs, from the edges of the traversable roadway.

134 "Intersection - The area embraced within the prolongation or connection of the lateral curb lines or, if none, then of the lateral boundary lines of two or more roadways which join one another at an angle, whether or not one such roadway crosses the other."

* * * * *

MR. ZITOMER: Part (a) of the definition of "Crosswalk" has already been read.

"Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface."

* * * * *

135 MR. ZITOMER: Your Honor, I offer in evidence Section 99(c).

THE COURT: Very well, that may be admitted.

MR. ZITOMER: 99(c) reads as follows:

"An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

* * * * *

137 THE COURT: You are offering 21(a)? Very well, I am going to let you do it.

MR. ZITOMER: "No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed -- "

* * * * *

138 MR. ZITOMER: "Section 21(a). Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving."

The next section I am offering, Your Honor, is Section 53.

* * * * *

139

MR. ZITOMER: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

* * * * *

MR. ZITOMER: "Sidewalk." That is Section No. 2 under "Definitions."

"That portion of a street between the curb lines or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians."

Your Honor, I have a witness whose principal testimony will be with respect to damages. He would testify as to where the deceased was going on this particular day. I don't know whether or not Your Honor wishes that I introduce -- I proceed on that evidence at this point. I don't think it would

140

have anything to do --

THE COURT: I want to finish all evidence that the plaintiff has on the issue of liability before I touch the issue of damages. Now, if any witness will testify on both issues you can call him twice, but I do not want to reach the issue of damages until you have exhausted your evidence on the issue of liability.

MR. ZITOMER: Would Your Honor permit me in this case to reserve evidence of the fact that he was on his way to work that day? I don't think it's going to make any difference as to how the accident occurred.

THE COURT: I want all the evidence that you consider relevant on the issue of liability to be put in. I will not let you reserve any testimony going to the issue of liability. I want you to exhaust all your testimony on the issue of liability. Now, if you consider this relevant to the issue of liability you have got to put it in now; if you don't, then it is out of the case.

MR. ZITOMER: Well, Your Honor, it is also relevant to the issue of damages, and so I would like to call the witness on the damages.

THE COURT: I am not going to repeat this. I want you to withhold

anything that you have on the issue of damages for the time being, but you have got to finish your case on liability. I want you to reach a point when

141 you say that I have finished all my evidence on liability.

MR. ZITOMER: Your Honor, I understand the depositions are in evidence of the driver.

THE COURT: Yes.

MR. ZITOMER: And I understand that the corporate existence is conceded and that the truck driver was operating for the defendant at the time.

MR. GRAHAM: That was admitted in the answer and at pretrial.

MR. ZITOMER: I just want to make sure of that, Your Honor.

Now, with that evidence, the evidence that has been already introduced; I would like to keep that photograph for the purposes of any record, that is, the markings on the blackboard.

THE COURT: You would like to do what?

MR. ZITOMER: I would like to have the markings on the blackboard, Your Honor, duplicated, which with the Court's permission I would like to do some time today.

THE COURT: You are offering it in evidence, I take it?

MR. ZITOMER: The diagram that is now on the blackboard, yes, Your Honor.

THE COURT: You are offering the diagram in evidence?

142 MR. ZITOMER: Yes, Your Honor.

THE COURT: It may be admitted.

(Diagram on blackboard was received in evidence as Plaintiff's Exhibit No. 9.)

THE COURT: You may have a photograph taken of it, if you wish, after court hours and substitute the photograph for the original, because the original is going to be erased. We will need the blackboard for the next case.

MR. GRAHAM: May that be with the understanding that the photographer will sell a copy of it to me at my expense?

THE COURT: Yes, of course.

MR. ZITOMER: On the issue of the circumstances of the accident and liability, Your Honor, that is all I have; but I have not rested my case with respect to damages.

* * * * *

143 MR. ZITOMER: I have completed all evidence that I have as to the cause and circumstances surrounding the accident.

THE COURT: Now I want you to answer yes or no to the following question. Do you rest on the issue of liability for the accident?

(Brief pause.)

MR. ZITOMER: Your Honor, I can't honestly answer that question unless liability be defined as not including the causal connection between the accident and his death.

144 THE COURT: I am not including -- I consider the causal connection between the accident and death as a separate issue.

* * * * *

MR. ZITOMER: Yes, Your Honor.

* * * * *

145 MR. GRAHAM: I at this time move for a directed verdict on behalf of the defendant.

* * * * *

THE COURT: Ladies and gentlemen of the jury, for the next few minutes we are going to take up a matter for which your presence is not required, so you may retire to the jury room and be at ease and we will send for you very shortly when we need you again.

(The jury retired to the jury room.)

THE COURT: Now, Mr. Graham, you have a motion?

MR. GRAHAM: I do, Your Honor. At this time, the plaintiff having rested her case on the issue of liability, the defendant moves for a directed verdict.

THE COURT: Very well. I will hear the other side and then let you reply if need be.

MR. GRAHAM: All right, sir.

MR. ZITOMER: There are two issues, Your Honor, for the jury.
The first issue is whether or not the pedestrian was within an unmarked
146 crosswalk as defined by the Motor Vehicle Regulations --

THE COURT: No, the real issue is whether you have proven any negligence on the part of the driver and also the question of contributory negligence, but I think the primary issue is whether there is any evidence of negligence on the part of the driver.

I am suggesting this to you in order to help you, to let you know what is in the Court's mind, but you may argue the matter in your own way.

MR. ZITOMER: Your Honor, as I understand the regulations of the Motor Vehicle Department, that a pedestrian in an unmarked crosswalk has the right-of-way and it is the duty of a driver of a vehicle to yield the right-of-way to the pedestrian, stopping, if necessary, to avoid colliding with him. Now, this is negligence and evidence of negligence, that is, the failure to yield the right-of-way to a pedestrian in an unmarked crosswalk is itself evidence of negligence.

We think we have established that this pedestrian was upon the roadway a sufficient length of time to have been seen by any reasonably prudent driver approaching this road. The diagram that we have in evidence shows the approach of this particular truck driver to have been a straight and unobstructed approach to the point of the impact. It shows that the pedestrian
147 crossed at a very slow rate of speed, he walked a distance of approximately 30 feet to the point of impact and had only about nine feet left to his ultimate safety; and that during the time that it had to take him to travel that distance of 30 feet the truck would have been travelling at approximately, in rough terms, ten times his distance, so that while the pedestrian travelled 30 feet the truck itself travelled 300 feet, and that while the truck was upon the highway for a distance of 300 feet up to the point of impact there is no excuse under the existing law why the truck driver should not and could not in the exercise of due care have seen the pedestrian in ample time to have brought his vehicle to a stop in order to avoid endangering him.

There is, in addition, evidence that this pedestrian was oblivious of the peril which he was in. This evidence is made quite clear by the only eye witness who saw this pedestrian from the time that he left the curb up until and shortly following the moment of impact, and that is a completely disinterested witness who was standing at the bus station when, according to his testimony, he saw the impact only a very few feet in front of him. According to this evidence which he has given, the pedestrian was in a dazed condition or was oblivious to all danger of traffic and that this was apparent to this witness from the time the pedestrian left the curb up and through
148 the point of impact.

What was apparent to this witness should have been apparent to a reasonably observant and reasonably prudent truck driver. The fact that he should have observed this and failed to take precautions to stop it places the responsibility for this accident upon him.

The doctrine of last clear chance assumes that there is some contributory negligence on the part of the pedestrian, and simply for the sake of argument if we were to assume that the pedestrian, the deceased in this case, was negligent in failing to look in either direction, the doctrine of last clear chance states that he was oblivious to that peril. This obliviousness was obvious to the witness to the accident; it should have been, therefore, apparent to the driver of the truck. The mathematical distance that had to be traversed by the truck while the pedestrian was travelling about one-tenth of his speed shows that the truck driver was in a position, one, to see the obliviousness of the danger of the pedestrian; two, in a position to bring his vehicle to a halt to avoid colliding with the pedestrian; three, that he failed to do that because the witness states that there was a collision between the pedestrian and the truck at the left front bumper of the truck and that the mirror struck him on the head or some object struck him on the head as it passed. Your Honor will notice that the truck itself is such
149 that the mirror is at the very leading edge of the truck. So that this is not a situation of walking into the side of the vehicle. But even if it were, there are cases, the most recent cases I think is -- the most pertinent

case on point is the Garcia case. I would like to cite to Your Honor the pertinent cases in this case dealing with the last clear chance, if Your Honor will permit me.

THE COURT: Have you got the books here?

MR. ZITOMER: Your Honor, I don't have all the books here, but I have the citations and I am sure I could get them here briefly.

THE COURT: I have to decide things now.

MR. ZITOMER: 90 App. U. S. That is the Garcia case, Your Honor.

THE COURT: What is the name of the case?

MR. ZITOMER: That was a case where the deceased walked into the side of a streetcar, and the passengers in the streetcar testified that the deceased was oblivious, walking across the street obviously oblivious of the peril. The streetcar operator did not stop or sound his gong, the pedestrian walked into the side of the streetcar and was injured. There the decision granting a recovery to the injured person was affirmed by our Court of Appeals in 1952.

THE COURT: What is the name of the case?

150 MR. ZITOMER: That is Capital Transit vs. Garcia.

THE COURT: Yes, I am familiar with that case. Was that a death case?

MR. ZITOMER: I recall that it was, but I wouldn't say for sure.

THE COURT: Very well. What is the citation to that case?

MR. ZITOMER: That is at 90 U. S. App. D. C. 168.

THE COURT: You know, when you have two or three cases that you think are all pat you ought to have the books with you because we can't stop.

MR. ZITOMER: Will Your Honor permit me --

THE COURT: I can't adjourn court to go to the library.

MR. ZITOMER: Will Your Honor permit me just a second? I will ask my associate whether he will get these citations.

THE COURT: Very well.

(Brief pause.)

MR. ZITOMER: I would like to refer Your Honor to the case of Boaz vs. Windridge and Handy, a 1939 decision, which appears at 70 App. D. C. at page 25.

THE COURT: What does it hold?

MR. ZITOMER: Your Honor, that held that the doctrine of last clear
151 chance applied even though the defendant urged that the deceased came from
behind another vehicle.

THE COURT: Of course the doctrine of last clear chance always
applies in any case where both parties are negligent, provided there was
an interval during which the defendant could have done something to have
prevented the accident. I don't need any authorities to sustain that proposition.

MR. ZITOMER: The first case I cited to Your Honor sustains exactly
that --

THE COURT: I have the Garcia case here.

MR. ZITOMER: Does Your Honor want me to continue with the other
cases?

THE COURT: Yes, please.

MR. ZITOMER: There is the Standard Oil Co. vs. McDaniel, decided
in 1922. That appears at 52 App. D. C. page 19, and that too was a case of
a pedestrian crossing a roadway not in an intersection, not in a crosswalk,
and with his back to traffic or at least walking diagonally.

THE COURT: What proposition are you citing that case for?

MR. ZITOMER: For the proposition, Your Honor, that a truck driver
must, if necessary, bring his vehicle to a stop.

THE COURT: Of course he must. You don't have to establish that.

152 MR. ZITOMER: May I state to Your Honor what the Court said in
that? I think that language is so pertinent to this case.

THE COURT: Very well.

MR. ZITOMER: "Appellant urges that the exercise of the slightest
degree of care at any moment before McDaniel reached --"

McDaniel was the deceased

" -- before McDaniel reached the line of danger would have saved
him. Perhaps so, but that is immaterial. This case does not turn
on his negligence -- "

that is, McDaniel's

" - - but on the negligence of Hargett after he, as a reasonably prudent man, had reason to believe that McDaniel was unconscious of the approaching danger. Where the driver of a truck observes, or should observe, a person about to cross in front of him, and it is reasonably apparent that he does not appreciate that danger is near, the driver should employ all reasonable means in his power to avoid injuring him. He should proceed on the theory that the pedestrian may continue in his course heedless of his peril, and therefore should bring his vehicle under control so that he may stop if necessary --"

153 THE COURT: I do not think it is productive of results to argue those general principles of law which the Court recognizes and concerning which the Court would not recognize any valid dispute. The question is of applying those principles to this case, to the facts of this particular case.

MR. ZITOMER: I should like, Your Honor, simply to cite to Your Honor, if Your Honor feels it pertinent, the American Ice Co. vs. Moorehead, 62 App. D. C. a case decided in 1933. This again deals with a similar factual situation.

THE COURT: Mr. Zitomer, you don't seem to follow me at all. I suggested to you that I recognize all these principles of law. You don't have to argue them, they are well settled. But I am going to give you an opportunity to argue their application to this case and to the evidence in this case.

MR. ZITOMER: May I demonstrate that to Your Honor on the board, on the blackboard?

THE COURT: You may demonstrate in any way you choose.

MR. ZITOMER: Your Honor wishes that I show --

THE COURT: No, I think you better come up here. I don't like to have you arguing from the other side of the courtroom.

MR. ZITOMER: Your Honor I think wants me to demonstrate how negligence on the part of the truck driver is demonstrated by the evidence. As I said to Your Honor earlier, the photographs, Plaintiff's Exhibit No. 7, this photograph shows that the view from the point of the impact backwards

154 down the road is a straight and unobstructed view. The plat that we

have in evidence is drawn to scale, and this plat demonstrates that that straight distance, the straight road to the point of impact that the truck travelled is over 300 feet long. The evidence shows that the truck driver sits atop of his engine on the truck and, sitting atop of his engine, he can look over the tops of all other passenger vehicles and this gives him a peculiarly appropriate view, a peculiarly good view of all traffic; that this was a pedestrian walking across the roadway where there were no parked cars and where there were no obstructions to his view.

The question then is, Your Honor, why did not the truck driver see the pedestrian before he did? According to the deposition, he did not see -- according to Mr. Lynch's own deposition, which has been offered in evidence, he did not see the deceased until he was 50 feet away from the deceased. Your Honor, the evidence surely demands that the truck driver give some reasonable explanation why he should not see a man in the street until he is 50 feet away from him, because at 50 feet it is already too late to stop. Travelling at 50 feet 25 miles an hour places this truck driver in a position where by the time he reacts he has travelled 35 feet and by the time he
 155 skidded he has struck the pedestrian. So that the truck driver has, by his own failure to observe the pedestrian in the street, placed himself in the position where he inevitably must strike that pedestrian if he continued across the street. Yet, the truck driver gives no explanation whatsoever for his failure to observe the pedestrian in the street except the rather feeble one that appears in Your Honor's deposition, the deposition of the driver, and that is that he emerged from behind moving traffic; but, Your Honor, when traffic is moving, it obviously implies that there are intervals between traffic, and a person walking across the road is not the same as a person walking behind a parked car. And, so, I think it is quite clear that from his --

THE COURT: Will you say that again? I did not follow your point. You are talking a little rapidly. Will you repeat that a little slower? I want to be sure that I follow it.

MR. ZITOMER: The driver of the truck gives as an excuse -- he

admits, first, that he didn't see the pedestrian until he himself was 50 feet from the pedestrian. This, we will concede, makes it impossible for him to avoid striking the pedestrian. The next question is, why did he not see the pedestrian earlier? Because obviously the pedestrian had to be upon the highway at a time when the truck was approximately 300 feet from the
 156 point of impact. Then why did the truck driver not see the pedestrian for that 250 feet before the time that he admits to seeing him? Because of the position of his position, driving this truck; this is why this photograph is pertinent, he sits atop the engine of his truck --

THE COURT: You have said that before, but I don't understand what point you are trying to make.

MR. ZITOMER: I am trying to make the point that the pedestrian could have been seen in the exercise of reasonable care, from the very facts already evidenced, and that all we need to do is to prove those circumstances by which a reasonably prudent person would have observed the pedestrian, that that is sufficient to evidence negligence on the part of the driver.

THE COURT: Mr. Graham?

MR. GRAHAM: Your Honor, the Garcia case, Capital Transit vs. Garcia, 90 App. D. C., has no application here because in that particular instance in that case the pedestrian was in open view; in other words, there was no other traffic to prevent him from being seen, and the Court of Appeals said the driver of the streetcar should have sounded the gong and stopped.

Well, in this particular case the evidence is abundantly clear that the driver of the truck sounded his horn and applied his brakes in an emergency
 157 braking.

I think it should be also clear that the pedestrian in this case was not within an unmarked crosswalk, the definition of which is a prolongation or an extension of the lateral sidewalk lines on each side of the street. There are no lateral sidewalk lines at the point where this man was struck. Therefore, being between crosswalks or outside of the crosswalks, the pedestrian had the duty to yield the right-of-way to the truck.

Mr. Zitomer has conceded for the purpose of this trial, as he said,

that at the time the driver of the truck became aware of the pedestrian it was too late for the driver to avoid hitting the pedestrian. That is an important concession because for the purpose of last clear chance there must be a time in which to act.

The explanation which Mr. Zitomer calls feeble but which was introduced by Mr. Zitomer as part of his case because Mr. Zitomer has introduced this deposition as part of his case, the deposition of the truck driver, the explanation was that the driver was driving at about, I believe, 15 to 20 miles an hour, north on 11th Street, traffic was coming toward him, coming south on 11th Street, when suddenly from behind one of the southbound trucks -- one of the southbound vehicles the pedestrian appeared. At that time he was
158 about ten feet out into the street. The truck driver blew his horn, saw that the pedestrian looked neither right nor left, immediately applied his brakes, and the impact occurred.

Mr. Zitomer has conceded that at the time the pedestrian came from behind the car it was too late for the truck to do anything but to hit him.

Now, the Court of Appeals in all of the last clear chance cases says there must be a time within which to act, and Mr. Zitomer has admitted that as of that time he didn't have time to act.

The explanation of why he was not seen before is very simple. By the deposition taken of the truck driver, the man stepped from behind this on-coming traffic and thus could not been seen.

There is no evidence of any speed or excessive speed or unreasonable speed on the part of the defendant.

MR. ZITOMER: Your Honor --

THE COURT: I will hear anything further from you if you wish to be heard.

MR. ZITOMER: Your Honor, I don't think Mr. Denver Graham deliberately misunderstood me or misstated what I said. I did not concede that the truck driver did not see the pedestrian. I stated that the truck driver said that he did not see the pedestrian when he was 50 feet away from the
159 man. I also said that his testimony is not credible, that this testimony is not consistent with the physical facts of the case.

THE COURT: Whether his testimony is credible or not, the point is that you offered it in evidence.

Now, you are not bound by his testimony because he is an adverse witness and you would have a right to impeach him or contradict him, but unfortunately there is no other testimony in the case that would contradict him.

You may bring in the jury.

(The jury resumed the jury box.)

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OPINION OF THE COURT

THE COURT: This is an action for personal injuries and wrongful death.

The admitted facts are that William Johnson, the deceased, was walking across Good Hope Road, from west to east, south of the south end of the Eleventh Street Bridge, in this City, and came into collision with the defendant's truck.

The defendant moves for a directed verdict on the ground that no basis of liability has been shown that would justify the submission of the case to the jury.

In a death case, naturally, one's sympathies are directed toward the deceased and even more so to the family that he leaves behind, but the courts must not permit any sentimental feeling to influence or sway their actions because, after all, the question whether someone should pay damages must be decided strictly on the evidence and in the light of the applicable rules of law.

There are three questions in the case. First, was the driver guilty of any negligence? Second, was the deceased guilty of contributory negligence? And, third, if each of the two questions are answered in the affirmative, does the evidence justify the invocation of the doctrine of the last clear chance?

161

The undisputed evidence again is that the deceased was standing near the curb and started to walk across the street. He walked slowly, he looked neither to the right or the left, and was apparently oblivious of his surroundings and of any passing traffic. A few moments later there was an

impact between him and the defendant's truck which was proceeding north. No one saw the impact; at least there are no witnesses that have been produced in behalf of the plaintiff that saw the impact. There is no evidence, therefore, as to how the impact occurred. There is no showing whether the truck struck the deceased or whether the deceased walked into the truck.

The impact was between the foot of the deceased and the front wheel of the truck and between the head of the deceased and the side mirror. These facts are as consistent with the possibility that the deceased, oblivious to what was going on, walked into the truck, as with the inference that the truck ran over his foot and that his head struck the mirror at the same time.

There is no evidence whatever that the driver of the truck was guilty of any negligence. It might be argued or asked why did he not see the pedestrian and it might be urged that it was his duty to see the pedestrian and that if he failed to do so he was negligent. The driver's deposition was

162 taken and is in evidence. He testified that the reason he did not see the pedestrian was that the pedestrian walked from behind another car, a south bound car, and that as soon as the pedestrian came into view, he, the driver, blew his horn and put on his brakes.

To be sure, the plaintiff is not bound by the driver's testimony because the driver was an interested witness, but the plaintiff did not offer any evidence to contradict the driver, nor can it be reasonably argued that the physical facts are inconsistent with the driver's testimony.

Under the circumstances, there is no room for any inference that the driver was negligent.

Second, was the pedestrian, the deceased, guilty of any contributory negligence? The undisputed facts lead to the conclusion that he was guilty of contributory negligence as a matter of law. He stepped off the curb and started to walk across the street slowly, looking neither to the right nor to the left, ignoring completely the passing traffic. Even if he was walking in the crosswalk, which is to be doubted -- certainly there was no marked crosswalk at the point -- he would nevertheless be guilty of negligence in failing to pay any attention to the traffic whatever and looking neither to the right nor to the left but walking slowly.

163 The final question is, assuming the contributory negligence of the plaintiff, is there any room for the application of the doctrine of the last clear chance? The doctrine of the last clear chance, of course, presupposes that the defendant or his employee was negligent and that the plaintiff was guilty of contributory negligence and was oblivious of his peril and that the defendant or his employee should have seen the peril of the other party and taken steps to prevent any injury to him. Necessarily, however, this doctrine is applicable only in a case where there was sufficient interval of time for the defendant or his employee to have taken steps to prevent the accident, provided he acted with due care and with reasonable promptness. There is no evidence here whatever justifying an inference that such an interval existed. The driver's deposition negatives that possibility. But even if his deposition be left out of consideration, then there is no evidence supporting the opposite conclusion.

The Court is not unmindful of the difficulties that counsel for the plaintiff in a death case is laboring under. The witness who knew best as to what happened is dead and this creates a difficulty, necessarily, for plaintiff's counsel. On the other hand, no defendant may be held liable to pay damages to anybody unless there is a showing that he was at fault.

164 The Court is of the opinion that in this case there is not sufficient evidence justifying the submission of the case to the jury and, accordingly, a verdict in favor of the defendant will be directed.

* * * * *

[Filed June 1, 1961]

NOTICE OF APPEAL

Notice is hereby given this 1st day of June, 1961, that Plaintiff, Delores Robinson, as Administratrix of the Estate of William Johnson, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of May, 1961, in favor of defendant City Express, Inc., against said plaintiff Delores Robinson, as Administratrix of the Estate of William Johnson, Deceased.

/s/ Joseph Zitomer
Attorney for Plaintiff

* * *

* * *

[Filed July 10, 1961]

POINTS ON APPEAL

1. The Court erred in directing a verdict for the defendant at the close of the plaintiff's case on liability.
2. The Court erred in ruling that there was no evidence of negligence of the defendant.
3. The Court erred in refusing to submit the case to the jury on the doctrine of last clear chance.
4. The Court erred in holding that the driver's failure to see the pedestrian until he was almost mid-way across the road did not evidence negligence.
5. The Court erred in admitting the conclusion of fact and opinion of law of the police witness that the place where the collision occurred was not an unmarked cross-walk.
6. The Court erred in forbidding plaintiff's cross-examination of the police witness upon the opinion and conclusion expressed after the witness had been made that of the defendant.

/s/ Joseph Zitomer
Attorney for Plaintiff

* * *

[Certificate of Service] _____

[Filed July 21, 1961]

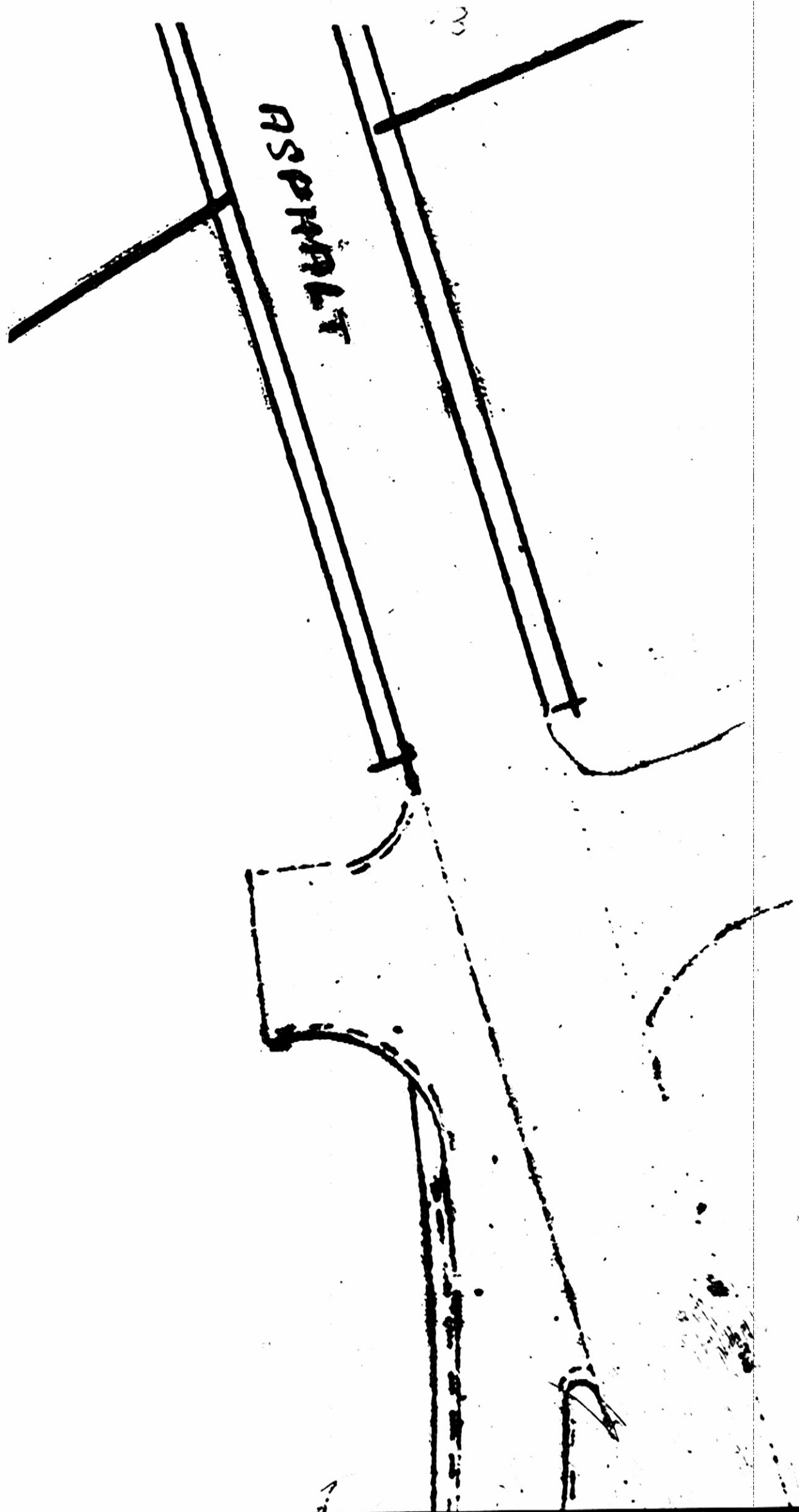
APPELLANT'S DESIGNATION OF RECORD

1. Docket Entries
2. Complaint
3. Answer
4. Pre-Trial Order
5. Plaintiff's Exhibit #8, Plat of Scene
6. Transcript of Proceedings as marked in red
7. Deposition of Malehorn as marked in red
8. Deposition of Edward Irving Lynch as marked in red
9. Notice of Appeal
10. Argument of Counsel and Opinion and Order of Court on
motion for directed verdict, as marked in red
11. Statement of Points
12. This Designation of Record

The appellant designates the forwarding for printing and inclusion
in the Joint Appendix.

/s/ Joseph Zitomer
Attorney for Appellant

[Certificate of Service]



BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,475

DELORES ROBINSON, as Administratrix of the Estate of
William Johnson, deceased, *Appellant*,

v.

CITY EXPRESS, INC., *Appellee*.

**Appeal from the United States District Court for the
District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

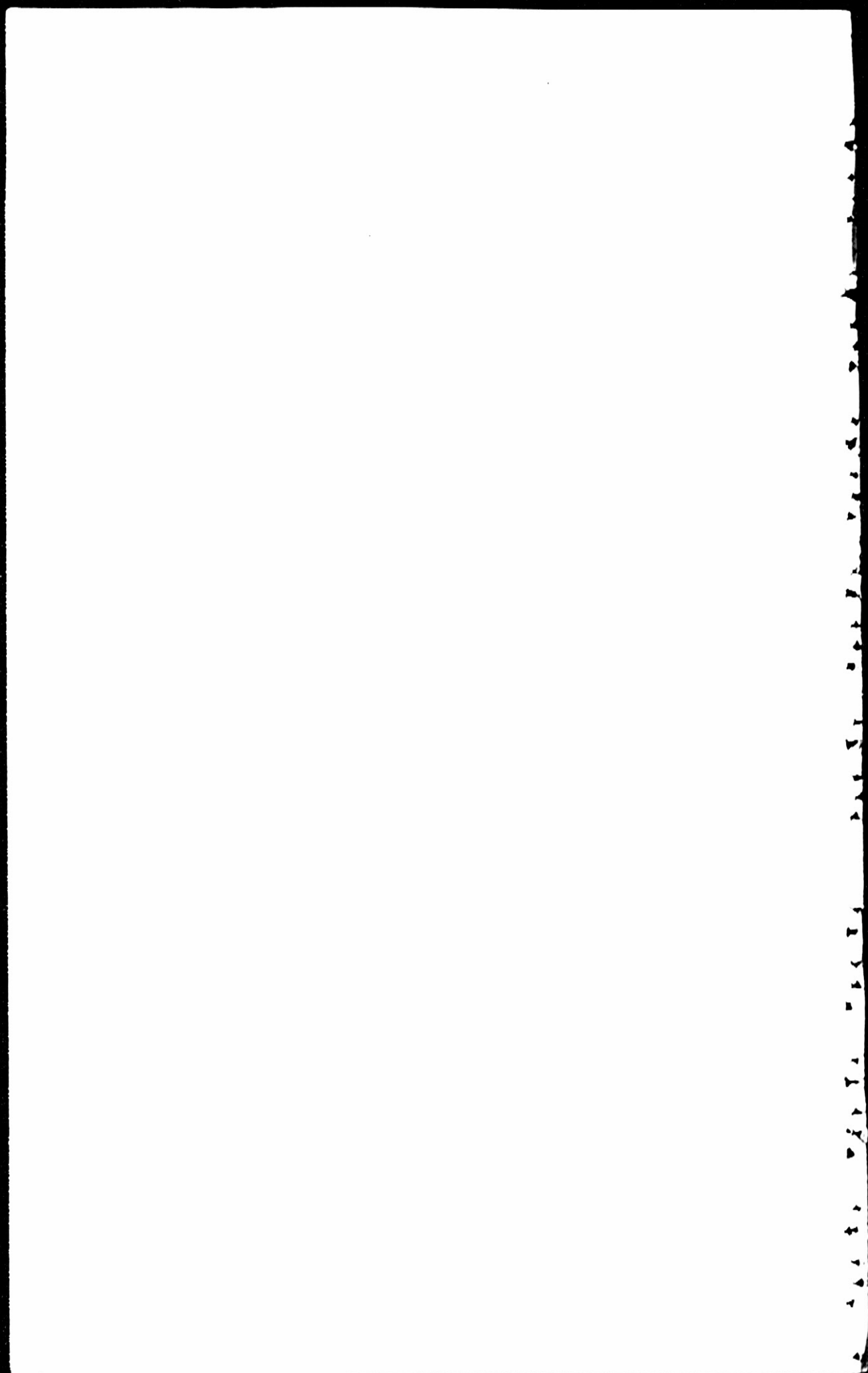
FILED

SEP 22 1961

Joseph W. Stewart

CLERK.

DENVER H. GRAHAM
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STATEMENT OF QUESTIONS PRESENTED

In appellee's opinion, the following questions are presented in this appeal:

1. Is an issue of negligence presented when the driver of a truck, operating within the legal speed limit, did not see a pedestrian crossing the street until the plaintiff stepped from behind an oncoming car at a point 50 feet from the truck and 70 feet from the nearest intersection and continued to walk, without hesitating, into the side of the truck which was skidding to a stop?

2. Does the doctrine of last clear chance apply to the following facts:

- (a) The truck was travelling within the legal speed limit;
- (b) The truck driver saw the pedestrian 50 feet away when he emerged from behind an oncoming car;
- (c) The pedestrian was about 10 feet from the west curb of a 35 foot street when first seen;
- (d) The truck driver immediately sounded his horn, applied his brakes and turned his wheel to the right;
- (e) The pedestrian continued to walk at a slow gait in an easterly direction, looking in neither direction; and
- (f) The truck skidded to a stop with the left front wheel resting on the pedestrian's foot about 8 feet 2 inches from the east curb?

3. May evidence be introduced to show that pedestrians had in the past crossed the street at a point outside the "crosswalk" as defined by the Traffic Regulations in

an effort to prove that such point thereby became a crosswalk?

4. May this Court, or any other court, disregard testimony of eye witnesses and attempt to reconstruct an accident based solely upon a mathematical formula and arguments of counsel?

5. May an investigating police officer be cross-examined about his official report to determine if he observed and reported that the point of impact was or was not within a crosswalk?

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* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,475

DELORES ROBINSON, as Administratrix of the Estate of
William Johnson, deceased, *Appellant*,

v.

CITY EXPRESS, INC., *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Basically, most of the Statement of the Case contained in appellant's brief is correct. There are, however, certain inaccuracies which appellee feels should be brought to the attention of this Honorable Court.

1. The pedestrian was not crossing at an intersection, but was crossing 11th Street 70 feet south of the south

curb of Anacostia Drive, as it intersects with 11th Street. (J. A. 46).

2. The pedestrian was not crossing a street 46 feet wide, but was crossing 11th Street at a point where it was 35 feet wide. (See Plaintiff's Exhibit #8 in its entirety and not just that small portion reproduced on Page 83 of the Joint Appendix, the colloquy between the trial judge and appellant's attorney appearing on pages 30, 31 and 32 of the Joint Appendix and Plaintiff's Exhibit #9, a photograph of the blackboard diagram prepared by the investigating police officer.)

3. The witness Malehorn testified that the truck "was not travelling at a very fast rate of speed for that area" and he estimated the speed as "twenty-five miles an hour, perhaps". (J. A. 41).

4. Mr. Lynch, who was not a party to the litigation, testified through the use of his deposition, that he was driving the defendant's truck at the time of the accident in a northerly direction on 11th Street. (J. A. 9) As he was approaching the south end of the 11th Street bridge, three or four cars were coming in a southerly direction toward him. The first car continued south on 11th Street while the other cars turned and went down a ramp toward the Naval Receiving Station. The truck driver first saw the pedestrian when he stepped out from behind the southbound car which continued on 11th Street toward the defendant's truck. (J. A. 11) At that time, the pedestrian was approximately 10 feet out in the street. (J. A. 12) The truck was approximately 50 feet from the pedestrian when he emerged from behind the southbound vehicle. (J. A. 12) When he observed the pedestrian the driver blew his horn, started to apply his brakes and cut to the right. (J. A. 11, 16, 17 and 88) The truck driver testified that his speed at the time he saw the pedestrian was 15 or 20 miles per hour. (J. A. 15)

5. The front of the truck did not strike the pedestrian, (J. A. 41) but went about three feet beyond the pedestrian

and the left front wheel stopped on the pedestrian's foot. (J. A. 11 and 12)

6. The area where the accident happened is rather confusing because of the number of streets and service roads which appear on the plat. In order that the Court may be thoroughly familiar with the area, appellee's attorney requests that it look at that area pictured at page 83 of the Joint Appendix and visualize it as a "man" standing with his back to the viewer. The head of the "man" would be the bridge, which is at the top of the diagram marked in double parallel lines on each side with the word "Asphalt" written between the double parallel lines. The right arm of the "man" is Anacostia Drive. The left arm of the "man" is the ramp leading to the Anacostia Naval Receiving Station, (also referred to as Anacostia Drive). The right leg of the "man" is 11th Street (also referred to as Nichols Avenue), and the left leg of the "man" is Good Hope Road. The impact occurred 70 feet south of the south curb of Anacostia Drive, (the right arm) as was testified to by the investigating police officer on page 46 of the Joint Appendix. The point of impact thus was on 11th Street (the right leg) at a point where 11th Street is 35 feet wide. (J. A. 30, 31 and 32 and Plaintiff's Exhibit #8.)

SUMMARY OF ARGUMENT

The trial court was correct in directing a verdict in favor of the defendant because no evidence was presented that defendant's driver could, or should, have seen the pedestrian until he stepped from behind an oncoming car just 50 feet way from the defendant's truck, which admittedly was travelling within the legal speed limit. Since the accident occurred 70 feet south of the nearest intersection, the plaintiff was not within a marked or unmarked crosswalk and thus had a duty to yield the right-of-way to vehicular traffic. The pedestrian was also guilty of contributory negligence as a matter of law, because he stepped into the path and admittedly looked

neither to his right nor left before stepping from the curb or while crossing the street, even though the truck's horn was sounded, the brakes were screeching and a witness was yelling at the pedestrian.

The trial court was correct in refusing to allow plaintiff below to introduce evidence which purported to show that since other people crossed the street at the point where the accident occurred, the truck driver should have recognized that the area was an "understood" crosswalk, even though the truck driver, a non-resident of the District of Columbia, testified he had never seen anyone else cross at that point.

The trial court was correct in not submitting the case to the jury on the doctrine of the last clear chance, since two of the elements of last clear chance were absent from this case. There was no evidence of primary negligence on the part of defendant's driver, nor time to avoid the accident, since he blew his horn, applied his brakes and cut to the right in an attempt to avoid the accident as soon as the peril of the plaintiff became obvious. The actions of the driver at that time are the same actions which this Court has repeatedly said should have been done by a driver when confronted with such an emergency.

The trial court was correct in allowing counsel to cross-examine the investigating police officer and to establish from him factual evidence concerning the exact location of the point of impact, how far it was from the intersection and whether or not the impact occurred within or without a marked or unmarked crosswalk.

ARGUMENT**I. THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT
IN FAVOR OF THE DEFENDANT.****A. There Was no Evidence That Defendant's Driver Could
Have Seen the Pedestrian Until He Stepped from
Behind An Oncoming Car When Defendant's Truck
Was Approximately 50 Feet Away.**

Appellant argues that the jury should have been allowed to infer or speculate that defendant's driver could have seen the pedestrian sooner than he did, which would constitute negligence in failing to maintain a proper lookout. In theory, failure to maintain a proper lookout could be the basis of primary negligence, but it cannot be so regarded until there is some credible evidence to support that theory.

Let us examine the theory advanced by appellant, which is based upon a mathematical formula, not supported by the evidence. This Court is asked to assume that the pedestrian was walking two miles per hour, which assumption is not based upon any evidence introduced at the trial. Indeed, the investigating police officer was asked by appellant's attorney the speed of a person walking at a slow gait. The trial court sustained an objection to that question and no answer was ever given. (J. A. 48) Since there is nothing in the record to support appellant's assumption that the pedestrian was walking two miles per hour, then the argument in support of the formula falls by its own unwarranted assumption.

This Court is also asked to assume, by way of argument in support of the formula advanced by appellant, that defendant's truck maintained a constant speed of 15, 20 or 25 miles per hour, which would according to appellant, mean that the truck was 200 feet away when the pedestrian was first seen. This might be a valid assumption to support the formula, if the evidence proved that the truck maintained a constant speed. However, the testimony from

the eye witness, as well as the physical facts, clearly discloses that the brakes were applied and the truck decelerated through a constantly reduced speed to a complete stop. Only expert testimony, based upon a complex formula of deceleration in feet per second per second could give this Court the average speed of the truck from the moment danger was perceived until the time the truck came to a stop; a time in which the progress of the pedestrian remained constant.

The next argument made by appellant is that the defendant's driver's testimony indicated that he thought the pedestrian would stop. Appellant argues from this that it was negligent for the defendant's driver to make such an assumption and that this was the cause of the accident.

However, it is the conduct of the driver and not his assumption which must govern in determining the question of negligence. The evidence is undisputed and uncontradicted that the truck was being operated at a slow rate of speed, (not exceeding the legal speed limit); the driver was fully aware of his surroundings and of approaching traffic; he was watching the road ahead generally and traffic proceeding in the opposite direction. Although the cab of the truck placed the driver somewhat higher than drivers of automobiles, he would not be able to see over the top of other cars until he was very close to them because of the angle of sight.

Also, it should be pointed out that the testimony of the driver, who was not a party defendant in the case, was offered by appellant by way of deposition. (J. A. 64) Prior to introducing the deposition into evidence, there was no request by appellant that the witness be called as an adverse witness, or that the witness be declared hostile.

Indeed, it should be apparent that the driver could not have been called as an adverse witness because his status was not that of an "officer, director, or managing agent of a public or private corporation, or of a partner-

ship or association which is an adverse party," within the provisions of Rule 43 (b) of the Federal Rules of Civil Procedure, which is identical with Rule 43 (a) of the Rules of the Municipal Court for the District of Columbia. The Municipal Court of Appeals for the District of Columbia had occasion to discuss the Municipal Court Rule in the case of *Smith v. D. C. Transit System, Inc.*, 153 A. 2d 658, when that Court of Appeals sustained the ruling of the Trial Court which refused to allow plaintiff to call the driver of defendant's bus as an adverse witness when the driver had not been sued.

Appellant, having introduced the testimony of the driver Lynch as part of her case, not only vouched for the credibility of Mr. Lynch, but is bound by his testimony.

This Court, in the case of *Howard v. Swagart*, 82 U.S. App. D.C. 147, 161 F. 2d 651, in discussing a similar instance, stated:

"Appellant did not make Cherry a party defendant in this action, although he was the driver of the car at the time of the accident, but utilized him as a principal witness on whose testimony she heavily relied for support of her claim against appellees. She did not call him as an unwilling or hostile witness under Rule 43, Federal Rules of Civil Procedure, and the record does not indicate that he was so treated. Now, on appeal, rather than vouching for his credibility as she is required to do, appellant attempts to discredit the testimony of her own witness . . ."

The record herein clearly shows that appellant did not issue a subpoena for Mr. Lynch, nor did she attempt to call him as a hostile witness, an alternative pointed out in the case cited in the footnote of the decision in *Smith v. D. C. Transit System, Inc.*, 153 A. 2d 658. That case is *Wilson v. Nu-Car Carriers, Inc.*, 158 F. Supp. 127, affirmed 256 F. 2d 332, and it stands for the proposition that under certain circumstances and with proper discretion, a driver might be called as a hostile witness.

Appellant may not be heard to argue that she should be allowed to impeach the credibility of the witness Lynch, because appellant's attorney knew what the deposition contained, having read the deposition and marked those portions which he used to introduce as part of the case (J. A. 124, 125), and thus cannot claim to have been taken by surprise by the testimony, which claim might possibly allow impeachment of the witness by him, in accordance with Title 14, Section 104 of the District of Columbia Code, 1951 Edition.

When appellant chose to introduce the deposition of Mr. Lynch, the driver, she gave him credit with the jury as a truthful and reliable witness. See *Bedell v. United States*, 63 U.S. App. D.C. 31, 68 F. 2d 776. The substantive evidence introduced by appellant through the deposition of Mr. Lynch discloses no grounds for inference that the truck driver could have been able to see the pedestrian sooner than he did because of the oncoming traffic, so appellant now argues that the driver's testimony is not to be believed on its face, because it is inconsistent with her mathematical formula.

Appellant cites the case of *Standard Oil Co. v. McDaniel*, 52 App. D.C. 19, 280 F. 993, in support of the contention that a driver may not assume that a pedestrian will stop walking and thereby take no steps to avoid an accident. Appellee wholeheartedly agrees with the rule laid down in that case, but hastens to add that in the *McDaniel* case the driver made no attempt to apply his brakes or swerve to the right to avoid the accident. He merely blew his horn and relied upon the pedestrian to become aware of the presence of the truck and avoid the accident. This Court condemned the driver for not applying his brakes or swerving to the right. In the case at bar, Mr. Lynch, the driver, did precisely what the Court said the driver should have done in the *McDaniel* case. Mr. Lynch sounded his horn, applied his brakes and, as indicated by the skid marks, veered to his right.

B. Since The Point Where The Accident Occurred Was Not Within A Marked Or Unmarked Crosswalk, The Pedestrian Had The Duty To Yield The Right-Of-Way.

Section 52 (a) of the Traffic and Motor Vehicle Regulation for the District of Columbia provides as follows:

"When traffic control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger. No pedestrian shall suddenly leave a curb or other place of safety and walk or turn into the path of a vehicle which is so close that it is impossible for the driver to yield."

A crosswalk may be marked or unmarked. There was no marked crosswalk where this accident occurred. An unmarked crosswalk is defined by the Traffic and Motor Vehicle Regulations of the District of Columbia under Section 2, Definitions, as follows:

"That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curb, or in the absence of curbs, from the edges of the traversable roadway."

A sidewalk, in the same Section, is defined as:

"That portion of a street between the curb lines or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians."

In order for the appellant to be correct in her assertion of right-of-way on the part of the pedestrian, it is incumbent upon her to prove that the pedestrian was within an unmarked crosswalk, and that he did not leave a curb or place of safety and walk into the path of traffic which

was so close that it was impossible for the driver to yield the right-of-way. The plaintiff's evidence failed to establish, even by so much as an inference, the facts necessary to furnish right-of-way on the part of the pedestrian.

The diagrams, photographs and testimony show that the pedestrian was leaving the west side of 11th Street at the wedge formed by 11th Street and Good Hope Road. (The right and left legs of our hypothetical man), proceeding to the east side of 11th Street. There is a sidewalk on both sides of 11th Street, extending parallel with the street and not perpendicular with each other at any place.

Based on the definition in the Traffic Regulations, an unmarked crosswalk here would be an extension of the lateral lines of the sidewalks on each side of 11th Street eastwardly and westwardly across 11th Street to where they would meet at opposite curbs at an intersection. That is a physical impossibility at this point.

Clearly, the pedestrian was not within the confines of a crosswalk, and appellant's evidence fails to prove the first point necessary to establish right-of-way on the part of her decedent.

Even if it be assumed that the pedestrian were within the crosswalk, appellant fails to establish right-of-way. The regulation clearly removes from the pedestrian his normal right-of-way if he is stepping into the path of traffic which is so close that it is impossible for the driver to yield. The uncontroverted evidence in the case showed that the decedent stepped from behind a southbound car into the path of the oncoming truck. Certainly, this was stepping from a place of safety into the path of the truck when it was impossible for the driver to yield to the pedestrian, since at this point the driver was only some 50 feet away and at the speed limit of 25 miles per hour, would have been travelling 37 feet per second. Reaction time being three-fourths of a second, the driver could not have stopped.

Indeed, appellant's attorney so conceded in argument on Motion for Directed Verdict when he said, "... because at 50 feet it is already too late to stop. Travelling at 50 feet 25 miles an hour places this truck driver in a position where by the time he reacts he has travelled 35 feet and by the time he skidded he has struck the pedestrian." (J. A. 75)

Supporting this theory of the case, the appellant cites the recent decision of this Court in *Johnson v. Geffen*, (United States Court of Appeals for the District of Columbia Circuit, #15724, decided December 1, 1960), 110 U.S. App. D.C. —, — F. 2d —, and also the Maryland case of *Baltimore Transit v. State*, 194 Md. 421, 71 A. 2d 442. These cases are clearly distinguishable from the present factual situation.

In *Johnson v. Geffen*, United States Court of Appeals for the District of Columbia Circuit, #15724, decided December 1, 1960), 110 U.S. App. D.C. —, — F. 2d —, this Court dealt primarily with allegations of the Pre-trial Statement, and the statements concerning a pedestrian in an unmarked crosswalk were but brief comments at the end of a lengthy opinion. No facts are given to indicate how much opportunity there was on the part of the policeman on the motorcycle to avoid the pedestrian. Presumably, from the opinion, the pedestrian was clearly in an unmarked crosswalk and there was opportunity to avoid him on the part of the motorcycle operator, unlike the facts in the present case. Also, as in the case of *Boaz v. Windridge & Hardy*, 70 U.S. App. D.C. 25, 102 F. 2d 628, the defendant was operating his motorcycle on the wrong side of the street.

Similarly, in *Baltimore Transit v. State*, 194 Md. 421, 71 A. 2d 442, the pedestrian was within the crosswalk and there was ample opportunity to avoid him. In addition, that case involved an intersection controlled by a traffic light with the pedestrian having the right-of-way by

virtue of the green light. There, of course, are no traffic controls at the intersection involved in this case.

The appellants cite two other cases decided by this Court which are similarly inapplicable to the present facts. *American Ice Co. v. Moorehead*, 62 U.S. App. D.C. 266, 66 F. 2d 729, and *Griffith v. Slaybaugh*, 58 U.S. App. D.C. 237, 29 F. 2d 437, are cases involving pedestrians within marked crosswalks at intersections controlled by traffic lights. These cases espouse uncontrovertible and long-standing rules of law. However, they have nothing to do with the present factual situation.

Appellee adopts the thinking of the Trial Judge, when he said (Tr. 153):

"I do not think it is productive of results to argue those general principles of law which the Court recognizes and concerning which the Court would not recognize any valid dispute. The question is of applying those rules to the facts of this particular case."

Appellee has no dispute with the holdings in the cases cited by the appellant, but it is clear they have no applicability to the present factual circumstances.

The point of impact in the case at bar was not adjacent to an intersection, since Section 2. Definitions of the Traffic and Motor Vehicle Regulations for the District of Columbia defines an intersection as:

"The area embraced within the prolongation or connection of the lateral curb lines . . . which join one another at an angle . . ."

A prolongation of the west lateral curb line of 11th Street (the right leg of the hypothetical man) would extend to the west side of 11th Street Bridge (the left shoulder of the man in the map) and a prolongation of the east curb of Good Hope Road (the left leg of our hypothetical man) would extend to bisect the angle between the north side of Anacostia Road and the east side of 11th Street Bridge (the right shoulder of the man in the map).

The only fact which need be considered by this Court in determining whether the point of the accident was within a crosswalk is the testimony of the investigation officer that the accident occurred 70 feet south of the intersection. This Court will readily appreciate that there is no crosswalk in the District of Columbia which is 70 feet wide.

C. The Evidence Discloses That The Appellant's Decedent Was Contributorily Negligent As A Matter Of Law, Regardless Of The Issue Of Primary Negligence Of Appellee.

There can be no dispute with the proposition that it is negligence for a pedestrian to walk or suddenly step into the face of oncoming traffic without looking to his right or left and to continue walking at a steady pace without heeding his surroundings, despite a blowing horn, screeching tires and a screaming voice. Nor can there be a dispute that this is negligence when done at a point on the road where there are no traffic controls, no marked pedestrian crosswalks and traffic is proceeding "moderately heavy" in both directions. Particularly, can there be no dispute that this is negligence, since the evidence shows the pedestrian was not even in an unmarked crosswalk. This being so, his conduct is in violation of Section 53 of the Traffic Regulations, which provides as follows:

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

The pedestrian is therefore guilty of negligence per se for failure to yield the right-of-way.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE THAT IT WAS CUSTOMARY FOR PEOPLE TO CROSS THE STREET AT THE PLACE WHERE THE ACCIDENT OCCURRED, PARTICULARLY SINCE APPELLEE'S DRIVER, WHO WAS A NON-RESIDENT, TESTIFIED HE HAD NEVER SEEN ANYONE ELSE THERE.

The proffered testimony was clearly irrelevant and appellant offers no authorities in support of her claim that the testimony should have been admitted. As was pointed out above, the pedestrian was definitely not within a marked crosswalk and could not have been within an "unmarked" crosswalk within the definitions of the Motor Vehicle and Traffic Regulations for the District of Columbia. Appellant therefore attempted to offer evidence to prove that the area was used by other pedestrians to cross the street and therefore should occupy the status of an "understood" crosswalk, although the Motor Vehicle and Traffic Regulations for the District of Columbia do not provide for such type of crosswalk. Therefore, the evidence was neither material nor relevant to establish the existence of a crosswalk within the definitions of the Motor Vehicle & Traffic Regulations of the District of Columbia.

Certainly, it goes without saying, that the area intended for pedestrian travel across the streets and highways is to be controlled by the Department of Highways of the District of Columbia Government and not by the fancy or whim of individual or collective jaywalkers.

For instance, it is common knowledge that pedestrians constantly cross C Street between the center door of the Municipal Center and the back door of the United States Court House, in the middle of the block between John Marshall Place and Third Street. Can it be said that there is an understood crosswalk in the center of that block between the two doors of the building? The mere asking of this rhetorical question supplies the answer.

The proffered testimony was also immaterial and irrelevant on the issue of notice on the part of the driver of

the defendant's truck, since at the time of its proffer there was no evidence in the case that he had ever been in the area before. Similarly, there was no evidence of physical circumstances surrounding the area which would put a driver unfamiliar with the area on notice of the existence of a pedestrian crossing.

The subsequent evidence produced by appellant proved that appellee's driver, Mr. Lynch, lived in Glen Burnie, Maryland (Tr. 125) and worked for the defendant corporation in Baltimore. Although he had travelled the area of the accident before, he had never noticed other pedestrians crossing 11th Street at that point previous to the date of the accident. (J. A. 16)

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT THE CASE TO THE JURY ON THE DOCTRINE OF LAST CLEAR CHANCE.

The doctrine of last clear chance is sufficiently delineated in the cases on the point previously decided by this Court that there can be no dispute regarding the definition of the rule in this jurisdiction, but only with its application to the facts placed in evidence by the appellants. In the recent case of *Mathew v. Lindsay*, 108 U.S. App. D.C. 292, 281 F. 2d 927, Judge Fahy reviewed, once again, the requirements for last clear chance as follows:

"The essential elements of the latter doctrine were in my opinion correctly stated by the District Court as follows:

1. That plaintiff was in a position of danger caused by negligence of both plaintiff and defendant;
2. that plaintiff was oblivious of the danger or unable to extricate himself from the position of danger;
3. that defendant was aware or by the exercise of reasonable care should have been aware of plaintiff's danger and obliviousness or inability to extricate himself from the danger; and
4. that defendant with means available to him was by the exercise of reasonable care able to avoid

striking plaintiff after he became aware of the latter's danger and inability to extricate himself from danger, and failed to do so."

The Lindsay case does not aid in the determination of the doctrine, since it assumed the applicability of the doctrine, rather than discussed it.

Last clear chance does not apply to this case because two of the four necessary elements are missing. The first missing element is the first element listed by Judge Fahy. There was no primary negligence demonstrated on the part of the defendant's driver. The position of peril was not caused by the negligence of both plaintiff and defendant, but solely by the negligence of the plaintiff.

The distinction between primary negligence giving rise to the perilous circumstances and the subsequent act of the plaintiff failing to avoid the harm was discussed by the Municipal Court of Appeals in the recent case of *Heinecke v. Western Union Co.*, Municipal Court of Appeals, 156 A. 2d. 143. There it was stated:

"Last clear chance cannot be invoked to charge the defendant with negligence; the breach of a primary duty must be established independently. It is rather what the defendant did or failed to do after plaintiff was in peril which constituted the breach of duty under the doctrine."

As previously discussed, the evidence does not disclose any primary breach of duty on the part of the appellee. The only claim that can be made by appellant is that appellee's driver should have seen the pedestrian before he stepped out from behind the oncoming automobile. The only way this could be demonstrated in this case is to prove one of these three hypotheses:

1. That appellee's driver should have been able to see over the top of the oncoming car and behind it, which was an impossibility, because of the angle of sight from a distance of more than 50 feet, or

2. That the car was translucent, which is an absurdity on its face, or

3. That appellee's driver was possessed of extra sensory perception, which is doubtful.

The doctrine of last clear chance arises only after the pedestrian has placed himself in a perilous position and was oblivious to danger, or unable to extricate himself. There was never a time while the pedestrian was behind the oncoming car and on the west side of 11th Street when he was in a position of peril or in danger of having an accident with appellee's truck. It was not until he stepped from behind the car and across the center line of the street that he was in a position of peril. Until that time, appellee's driver was proceeding within the legal rate of speed and maintaining a proper and adequate lookout, without violation of any traffic regulations. He has no duty to assume that a pedestrian will step from behind every oncoming car.

The second requirement for last clear chance which is missing is an opportunity to avoid the accident. This latter requirement has been discussed by this Court and the Municipal Court of Appeals in several cases. Perhaps the leading of these is *Dean v. Century Motors, Inc., et al*, 81 U.S. App. D.C. 9, 154 F. 2d 201. There, two cars entered an uncontrolled intersection at approximately the same time. The Court held that it appeared that neither the plaintiff nor defendant had an opportunity to avoid the accident. They held that the defendant had but one second in which to avoid the accident, which was "obviously not enough".

The rule was enunciated as follows:

"In these circumstances, we see no proper place for an instruction on last clear chance. The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant, but assumes that there was a time after

such negligence had occurred when the defendant could, and the plaintiff could not, by the use of means available, avoid the accident. It is not applicable if the emergency is so sudden that there is no time to avoid the collision, for the defendant is not required to act instantaneously."

The essential point is "time". Time in which to act! The *Dean* case held one second wasn't enough time. The case of *Gay v. Auger*, 97 U.S. App. D.C. 336, 231 F. 2d 495, involved a sudden emergency and a skidding car. This Court held that the doctrine of last clear chance applies "when, after the negligence and contributory negligence of the parties have placed one of them in a position of peril, the other has a reasonable opportunity to realize that peril and to avert the impending injury." In other words, "Under the rule of last clear chance it is what the defendant did or failed to do after the plaintiff was imperiled that constitutes the breach of duty for which the defendant is liable," *Landfair v. Capital Transit Co.*, 83 U.S. App. D.C. 60, 165 F. 2d 255.

Of all the cases in the District of Columbia on last clear chance, only that of *Capital Transit Co. v. Grimes*, 82 U.S. App. D.C. 393, 164 F. 2d 718, involves facts similar to those in the present case. The plaintiff-pedestrian in the *Grimes* case was struck while crossing Pennsylvania Avenue. She alighted from a westbound streetcar at the intersection of 12th Street and was crossing to the southbound curb of Pennsylvania Avenue. She had crossed the westbound track and was almost across the eastbound track when she was struck. The evidence indicated that the westbound car from which the plaintiff had emerged started up and she walked behind it across the westbound tracks into the eastbound track. The eastbound streetcar and the westbound streetcar passed in the intersection. The driver of the eastbound car testified his vision of the westbound tracks was blocked until after the westbound car passed. At this point he observed the plaintiff stepping

in front of his streetcar. He applied brakes and sounded the warning gong, but was unable to avoid the collision.

The Court said:

"The evidence establishes that the eastbound streetcar was travelling at a speed of from ten to twelve miles per hour, and that the motorman, upon seeing the appellee in a perilous position, exercised every means available to him to avoid the accident by sounding his warning gong and applying the emergency brakes.

As in the Dean case, we do not here find any 'evidence tending to show that' the motorman 'saw, or in the exercise of reasonable care and prudence should have seen' the appellee in sufficient time to avert the accident by use of means available to do so."

We feel that the present case is similar to the *Grimes* case. Just as in the *Grimes* case, the pedestrian is stepping from behind traffic moving in the opposite direction. As in the *Grimes* case, there is no evidence to indicate that the driver should or could have stopped in time to avoid the collision. The uncontroverted testimony is that he applied his brakes and sounded his horn immediately upon sighting the pedestrian. The evidence also showed that he swerved his vehicle to the right. What more can he do?

The appellant cites *Boaz v. Windridge & Handy*, 70 U.S. App. D.C. 25, 102 F. 2d 628. That case is clearly distinguishable. In the *Boaz* case, first of all there was evidence of primary negligence. The operator of the motorcycle which struck the pedestrian was driving on the wrong side of the road. Secondly, the evidence tended to show that there was a considerable interval from the time the pedestrian appeared from behind the double-parked truck until he was hit. There was further evidence that the motorcycle never stopped and there was no evidence to show that the motorcycle made any effort to stop, or avoid the pedestrian, or sound a warning of his

approach. One witness testified that the motorcycle went some distance beyond the point of collision, turned around and came back to the scene. Of all the witnesses at the scene, there is no testimony of a horn, skid marks or yell.

Standard Oil Co. v. McDaniel, 52 U.S. App. D.C. 19, 280 F. 2d 993, is similarly inapplicable. In that case, the driver of the truck, although fully aware of the pedestrian's presence, did not apply his brakes, or make any effort to avoid the accident.

The same can be said of *Capital Transit v. Garcia*, 90 U.S. App. D.C. 168, 194 F. 2d 162. In each of these cases the fact which fixes liability on the defendant was either not warning of his approach or making any effort to avoid the pedestrian.

In the instant case, the testimony is quite to the contrary. In the *Garcia* case, if the motorman had sounded his gong and applied his brakes upon seeing the pedestrian, could he be said to be liable?

In *Standard Oil v. McDaniel*, 52 U.S. App. D.C. 19, 280 F. 993, if the truck driver had sounded his horn, or applied his brakes and turned to the right immediately upon seeing the pedestrian, could he be said to be liable?

The very evidence which brings into play the doctrine of last clear chance in each case cited by the appellant is contradicted by the facts in the present case. Each of these cases applying the doctrine stands as authority for not applying it here. Indeed, this is what the Court said in *Boaz v. Windridge & Handy*, 70 U.S. App. D.C. 25, 102 F. 2d 628:

"In these circumstances we think that, when deceased undertook to walk from the south to north side of the street, especially in view of the presence of parked automobiles on the near side, it was his duty to look in the directions from which danger might be expected and that, if he failed to do so and his negligence in this respect was the sole proximate cause of the injury, there could be no recovery.

"If, therefore, the evidence had shown that the collision occurred as deceased emerged from behind a parked car and when the view of the driver of the motorcycle was obscured, so that he could not see the deceased as he walked into his pathway, we should have to affirm the judgment of the court below."

Since the pedestrian was not in a position of peril until he crossed over the center line of the street into the front of appellee's truck from the sheltered area behind the oncoming car, and since appellee's driver, even by the admission of appellant's counsel, could do nothing to avoid the accident at that time, since he was but a scant 50 feet away, the doctrine of last clear chance has no application to the facts presented in this case on appeal.

IV. THE COURT DID NOT ERR IN ALLOWING COUNSEL TO CROSS-EXAMINE THE POLICE OFFICER TO ELICIT FACTUAL TESTIMONY FOR THE PURPOSE OF DETERMINING WHETHER THE POINT OF THE ACCIDENT WAS OR WAS NOT IN A CROSSWALK.

Appellee agrees with appellant's counsel that no prejudice was caused by the introduction of the testimony that the investigating police officer reported to his superiors in his official report of the accident that the point of impact was not within a crosswalk.

This Court is well familiar with the duty of an investigating police officer to make an official report of investigation, which report is known as a PD-10. These reports have been the subject of several decisions of this Court and the Municipal Court of Appeals. See *McWilliams v. Lewis*, 75 U.S. App. D.C. 153, 125 F. 2d 200.

Appellant called the investigating police officer, Fred L. Barber, as her witness (J. A. 44, et seq.) and he testified concerning observations made by him, as well as certain measurements, including the point of impact and skid marks. Because of the general confusion arising from the streets and ramps in the general area of the accident and whether they were one-way or two-way streets, he was

asked on cross-examination a factual question as to whether the point of impact, as he observed it, was within a pedestrian crosswalk. His testimony was that the point of impact was not within a crosswalk. (J. A. 53 and 54.)

This testimony is not a conclusion of law, as appellant contended, but was, as pointed out on page 54 of the Joint Appendix, a statement of fact whether the point of impact was in a crosswalk. The officer was testifying solely as to facts. It could not be disputed that if he were looking at a painted line in the street he would be permitted to testify about the relationship of the point of impact to the painted line. The only difference here is that the line was not painted, but his testimony was based upon his testimony as a trained officer and his ability to view an extension of a curb line or a sidewalk line with his naked eye.

The testimony was made from the observations of the witness of physical facts, and was not based on hearsay as to what other persons told him at the scene of the accident or elsewhere, and was not a summary of the facts of the entire accident. The testimony was not a conjecture on the part of the investigating officer, nor was it a conclusion as to the fault of either of the parties to the accident, which was reached by the officer after talking to the witnesses and trying to reconstruct the accident. Such conclusions of the investigating officer relating to the fault, or lack thereof, of parties to the accident would clearly be inadmissible. See *Levin v. Green*, 106 A. 2d, 136.

Appellant tendered Officer Barber as an expert in the investigation of accidents and proffered his qualifications to testify concerning reaction time and the distance travelled by vehicles at certain speeds. Certainly, if he is qualified as an expert on these items because of his experience at investigating previous accidents, he would be well qualified to state whether or not an accident occurred within an unmarked crosswalk.

CONCLUSION

It is respectfully submitted that the trial court did not err in directing a verdict in favor of the defendant, because there was no evidence of primary negligence because the accident did not occur within a crosswalk, but occurred between intersections, and because the appellant's decedent was contributorily negligent as a matter of law. It is further submitted that the trial court did not err in refusing to submit the case to the jury under the doctrine of last clear chance and, further, did not err in the excluding of testimony concerning the use of the area where the accident happened for other pedestrians crossing the street, and in admitting testimony that the accident did not occur within a marked or unmarked crosswalk. Therefore, the judgment below should be affirmed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,475

DELORES ROBINSON,
As Administratrix of the
Estate of William Johnson,
deceased,

Appellant.

v.

CITY EXPRESS, INC.,

Appellee.

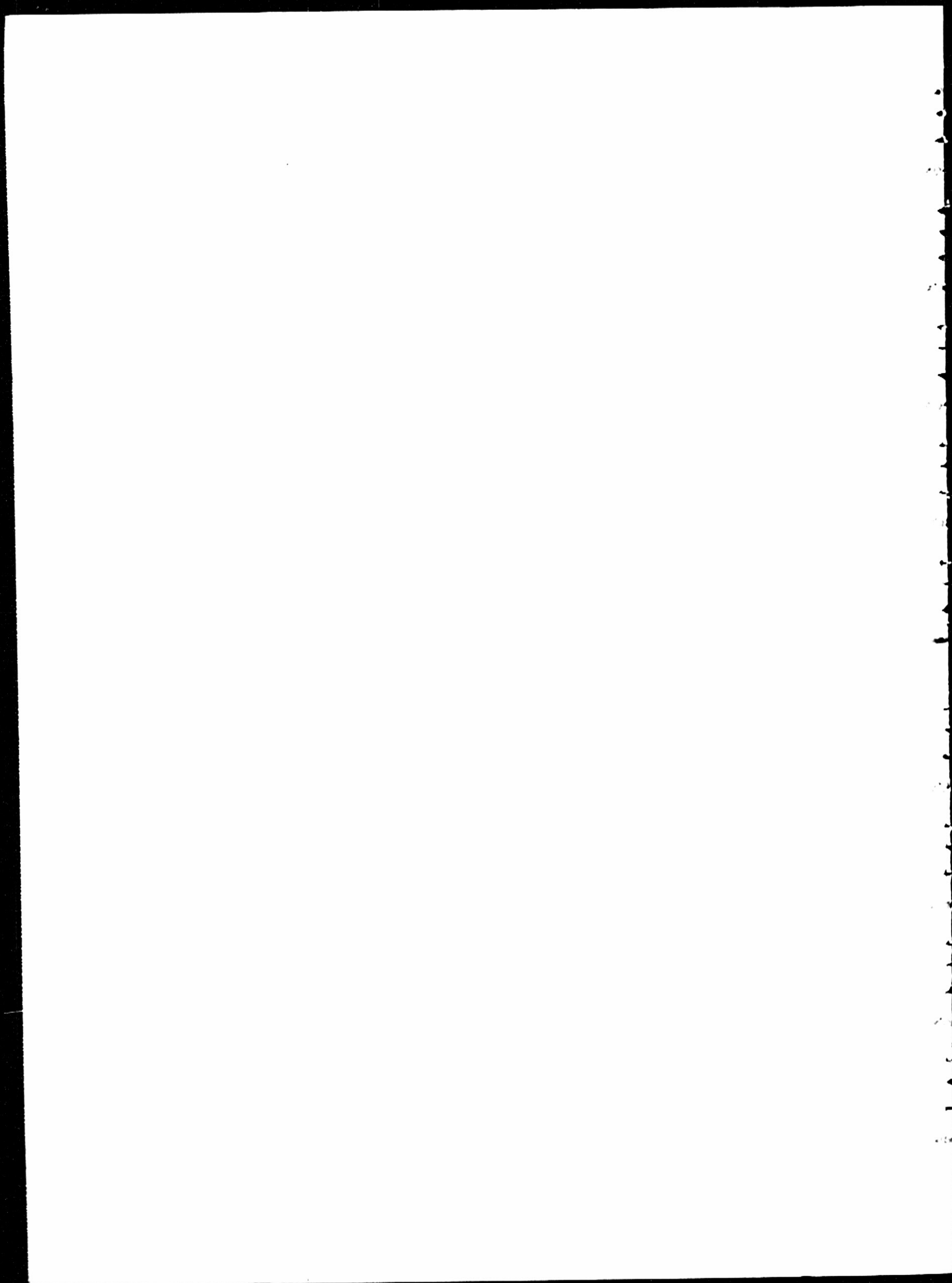
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,475

DELORES ROBINSON,
as Administratrix of the Estate of William Johnson, deceased,
Appellant,

v.

CITY EXPRESS, INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OUTLINE

- I. Appellee ignores principle that on appeal from a judgment entered on a directed verdict for the defendant, the evidence is construed most favorably to plaintiff.
- II. The jury may draw reasonable inferences from the evidence and employ a knowledge common to all men.
- III. The testimony of the truck driver is evidence regardless of which party offers it.

ARGUMENT

I.

APPELLEE IGNORES PRINCIPLE THAT ON APPEAL FROM A JUDGMENT ENTERED ON A DIRECTED VERDICT FOR THE DEFENDANT, THE EVIDENCE IS CONSTRUED MOST FAVORABLY TO PLAINTIFF.

Where a verdict is directed for the defendant, the plaintiff is entitled on appeal to the most favorable construction of the evidence, and to reasonable inferences therefrom. This principle is so well established that it hardly need be necessary to incorporate it in the main brief. Boaze v. Windridge & Handy, (1939) 70 App. D.C. 24, 102 F.2d, 628, and countless cases appearing in Digest, Key No. Trial 176 et seq.; and Key No. Appeal and Error, 927(7). But the principle is ignored by appellee in its brief where the opposite is done. The main errors are these:

(1) Appellee says in its counter-statement of the case that the pedestrian "was not crossing at an intersection"—but that is not the case, as we shall hereafter see by the evidence.

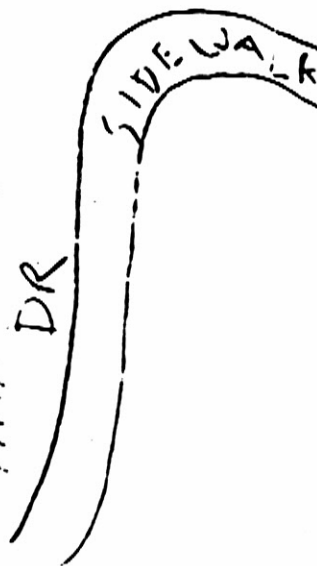
(2) Appellee says the portion of the road which the pedestrian was crossing was 35 feet wide instead of 46 feet wide as appellant contends.

(3) Appellee infers that the front of the truck did not strike the pedestrian but went about three feet beyond him (Appellee's Br. p. 2), but we shall refer to the evidence of impact on the front bumper of the truck; and

(4) Appellee contends that the pedestrian was not within an unmarked cross-walk, but we shall refer to evidence that the cross-walk was either at or very close to the area between the bus stop and the place where the pedestrian began his crossing, as demonstrated through the evidence of the police witness, his blackboard drawing, and the testimony of the only witness who saw the pedestrian leave the curb.

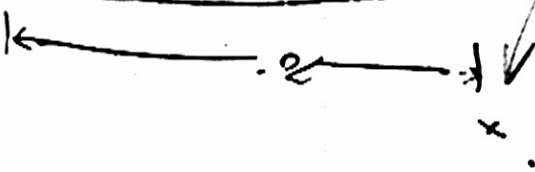
We respectfully invite the Court's attention to Plaintiff's Exhibit 9 which appears on the opposite page as it was photographed from the

ANACOSTIA
DR



124 384 400-9

ANACOSTIA DR.



Impact. says policeman

11th St
S.E.

blackboard with the permission of the Trial Court. This is the drawing made by the police witness and about which he was questioned (JA 58, 59). This drawing is not to scale and the Trial Court sustained Appellee's objection to Plaintiff's attempt to have the bus stop indicated on the scale drawing of Plaintiff's Exhibit 8. (JA 30, 31) However, the blackboard drawing opposite is helpful in understanding the testimony of the policeman and the testimony of eye-witness Malehorn. From an examination of the photographs received in evidence, it is apparent that the bus stop is located in the vicinity of the letter "N" (indicating north) on the opposite blackboard drawing. The witness Malehorn was standing at the bus stop and testified as follows:

[Malehorn on direct examination, JA 33] . . . There is a road leading from the main gate of the naval station on to Eleventh Street which intersects directly across the street from Eleventh Street where I was standing.

Q. Is there any other road? A. There is also another road which comes in on the same point, the same side of the street as the road leading from the naval station.

Q. Forming a fork? A. Forming a fork directly across the bus station where I was standing. * * *

[JA 34, continuing] Q. Can you tell us when you first observed William Johnson, the man who was injured?
A. A few minutes prior to the accident, I looked across Eleventh Street toward the intersection and I saw a colored man standing at the point where these two roads intersect with Eleventh Street.

Q. Would that be the westerly side of Eleventh Street?

A. Yes.

The police witness was asked by plaintiff's counsel to place a mark "W" at the point where the road leading to Anacostia Receiving Station and the one leading down to the river come together (JA 50), and the mark "W" was placed on the photograph of the accident scene of plaintiff's Exhibit 7. This point "W" corresponds on the blackboard drawing shown in this brief to where the letter "w" appears in the word "sidewalk" printed on the blackboard sketch preceding this page.

Now the police officer being questioned about the existence of a crosswalk between point "W" and the bus stop answered as follows:

[Officer Barber on re-direct, JA 58, 59] Q. Officer, as I understand your evidence, that a pedestrian crossing between those two points would have to cross at a diagonal to the traffic in order to be in the crosswalk? A. That is correct sir; to comply with the traffic regulations. * * *

Q. . . . I ask you for the crosswalk, sir, between Anacostia Drive and this point of 11th Street? Will you come down here, Officer, if you would, and indicate the crosswalk of that point? * * *

Q. Now, sir, is not the bus stop, Officer, is not the bus stop opposite — very close nearby that crosswalk that you have just indicated? A. It is within this vicinity (indicating), but what the measurement is, I don't have that.

Q. And, Officer, is not that bus station located directly opposite Point W? A. It would be in that area.

It was stipulated between the parties that the distance across 11th Street from point "W" is 46 feet. (JA 50) We respectfully suggest that the foregoing portions of the transcript evidence a crosswalk between point "W" and the bus stop; and that the witness Malehorn testified that he saw the pedestrian leave the curb at point "W" and proceed almost at right angles toward him. This, we urge, was evidence that the pedestrian was crossing within an unmarked crosswalk at an intersection.

Treating next the dispute which appellee raises by suggesting that the point of impact was three feet to the rear of the front of the truck, we suggest the following evidence was sufficient to demonstrate the point of impact at the left end of the front bumper of the truck:

[Officer Barber on direct examination, JA 45] Q. Officer, did you make an examination of the vehicle, the truck that I just showed to you? A. Yes, sir.

Q. What did you find? A. We established the point of impact on the vehicle to be on the left front bumper, the wheel and the edge of the side view mirror.

II.

THE JURY MAY DRAW REASONABLE INFERENCES FROM THE EVIDENCE AND EMPLOY A KNOWLEDGE COMMON TO ALL MEN.

As a matter of common knowledge, the jury had the right to take into consideration that a person walking at an ordinarily rapid gait [emphasis supplied] will travel about four miles per hour, and from the facts and circumstances immediately surrounding the happening of this accident, the jury might have fairly and reasonably concluded that said engine was running anywhere between 12 and 25 miles an hour at the time of said accident.

Merril v. Minneapolis & St. L. Ry. Co., 129 N. W. 468 (1910 South Dakota), at 129 N. W. 468, 471.

Judicial notice is taken that the ordinary walking speed of an average man is two to three miles an hour, 2.9 to 4.4 feet per second. McFarland v. Wildhaber, 334 S. W. 2d 1 (Missouri, 1960).

While it would, of course, be surprising to find a citation using the same language here, "slow gait," as witness Malehorn used, it seems more than fair to suggest that an "ordinarily rapid gait" being about 4 miles per hour; and an "ordinary walking speed" being between two and three miles per hour; that a "slow gait" is fairly measured at two miles per hour. Our Court has not refused to recognize common knowledge as an accepted basis to draw inferences. Smallwood v. District of Columbia, (1927) 57 App. D.C. 58, 17 F.2d 210, Howard v. Swagart, (1947), 82 U.S. App. D.C. 147, 161 F.2d 651.

Appellee urges that the formula suggested in our brief does not allow for the deceleration of the truck over a distance of 30 feet (which is the longest skid mark of any of the four wheels (JA 49)). But the evidence of witness Malehorn shows that the deceleration was "almost instantaneous" (JA 42), and again our common sense would indicate that a vehicle decelerating from 20 miles per hour (giving defendant-appellee the benefit of eye-witness Malehorn's estimate of 25 reduced to 20) to a slow speed at the moment of impact would average at least 10 miles per

hour during that last 30 feet. We suggest that the argument as to deceleration urges the Court to ignore the main outline of fact to indulge in theoretical quibbles. It is plain that the truck had it stopped 10 feet before it did would not have caused the injury and death of appellant's decedent. The jury had ample evidence before it to conclude that the driver could have seen the pedestrian at least 100 feet before he admits to seeing the pedestrian (50 feet). Therefore the driver travelled 100 feet without seeing the pedestrian who was there to be seen. Had he applied his brakes at any moment during 90 of that 100 feet the collision would have been avoided. These facts demonstrate the pivotal points of the cases on last clear chance cited in our main brief, which are: "opportunity" and "the means to avoid injury".

III

THE TESTIMONY OF THE TRUCK DRIVER IS EVIDENCE REGARDLESS OF WHICH PARTY OFFERS IT

We must here express to this Court our sincere regret that we feel compelled to answer an argument based upon the barest of technicalities, which should have no place in modern trials where the search for truth is and always should be foremost. Appellee argues that "Appellant, having introduced the testimony of the driver Lynch as part of her case, not only vouched for the credibility of Mr. Lynch but is bound by his testimony". [Appellee's Brief p. 7, citing Howard v. Swagart, 82 US App DC 147, 16 F2d 651 (1947)]

First we must point out that the underscored language nowhere appears in the Swagart case.

Second, the rule which appellee urges about being "bound" by the testimony of one's own witness never appears to have been the rule in this District; and

Third, the testimony of the driver himself is an admission of his failure to observe the deceased who was by the other evidence in the case in clear

view in more than sufficient time for the driver to avoid the collision. Assuming the truth of driver Lynch's testimony, he failed to see what the evidence discloses he could and should have seen in time to avoid the collision. A driver who sees a pedestrian at the moment of impact or just before impact, might just as well have never seen him at all. And the driver's evidence is just that ! A directed verdict in favor of the driver is not a prize to be given because he saw the pedestrian at or immediately before impact! What we here say is, even if the archaic rule were to be applied, it would still tend to evidence appellee's liability. But since the existence of such a rule is urged we feel duty bound to answer it.

In Wynne v. Boone, (1951), 88 U.S. App. D.C. 363, 191 F.2d 220, this Court said: "We must recognize that the trial judge may disregard the testimony of a particular witness even in the absence of any direct conflicting testimony. He (the witness) may be contradicted by the facts he states as completely as by direct adverse testimony. . . ."

Again this court has dealt with the point where defendant urged that plaintiff was bound by his own testimony, where there was other evidence of defendant's negligence:

"Obviously, the testimony of a party may be incorrect. The rule we are asked to adopt means, then, that the truth should not help a plaintiff who has testified to an error. But there is no estoppel, since no one has acted on plaintiff's representation, and no waiver since there was no intention to waive. The underlying notion seems to be that a party who has testified incorrectly should be punished by losing his case. But if he has committed perjury he should not be punished without trial, and if he has not committed perjury he should not be punished at all. Since his testimony was adverse to his interest, he is more likely to have been mistaken than lying. The proposed rule actually punishes him for two things, his honesty and his error. The plaintiff in most personal injury cases was subject, just before he was hurt, to excitement enough to explain mistakes of observation and memory. In many cases, including the present one, he was so badly hurt that he lost consciousness. And even the calmest and most disinterested witness often sees things that he did not see. There is no sound reason why

"the familiar doctrine that a party may contradict, though not impeach, his own witness, [emphasis supplied] should not, if the circumstances are consistent with honesty and good faith, be applied when he is himself the witness.

* * * * *

"In other words, the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source. It is rarely that two persons relate alike the same occurrence; and, in cases of accidental injury, it is not unusual for the person injured correctly to perceive and accurately to remember some of the circumstances, and to be unable to give a correct statement of all." Alamo v. Del Rosario, (1938), 69 App. DC 47, 50.

It would appear that if the plaintiff himself testifies favorably to the defendant and may show by other evidence that the defendant was negligent, then with stronger reason the plaintiff could show by other evidence that same negligence where the "favorable" evidence comes from the person whose conduct is in question. The rule in this District seems always to have been that a party cannot discredit his own witness by testimony as to his general character, but may give evidence to contradict any important fact to which the witness has testified. US v. Watkins, (1829), 3 Cranch. CC 441, 3 DC 441, Fed. Cas. No. 16,649. The Court below seems to have been of the same mind since it treated the evidence as subject to contradiction and refuted the contention that plaintiff was bound by that testimony (JA 79).

Howard v. Swagart, (1947), 82 US App DC 147, 161 F2d 651, urged by appellee, is clearly distinguishable. The plaintiff-appellant in the Swagart case had changed his entire theory of the facts in the Court of Appeals by urging there that a jury could have found that his witness, Cherry, had stolen the automobile, although plaintiff's theory in the Trial Court was that one Clinton had stolen the auto. The Court of Appeals held that the parking lot from which the auto had been stolen by employee Clinton was not liable for the negligence of driver Cherry, affirming the Trial Court,

and in dictum the Court quite understandably said that plaintiff could not impeach the credibility of his witness, Cherry. Nowhere does the Court state that plaintiff is "bound" by the testimony of the witness as appellee suggests.

The rule which appellee urges would have this effect: The more witnesses produced by plaintiff to give their recollection of the event, the less plaintiff will have proved, since according to appellee the defendant thereby has the option of choosing which of the testimony he prefers and binding plaintiff with it. The effect would be startling! The defendant would by this technique reverse the substantive rule that a party against whom a verdict is directed is entitled to the most favorable construction and inferences from the evidence.

Nor does it appear that this Court has ever thought that the Swagart case stood for the proposition appellee urges, for three years after Swagart, this Court rejected the same argument in Pritchett v. United States, (1950), 87 US App DC 374, 185 F2d 438, and again distinguishes between impeachment of a witness and contradicting him:

"The appellant asserts that the prosecutor may not impeach his own witness by such argument and with this we agree. But the prosecutor is not precluded from presenting other evidence which varies from or contradicts such a witness and then he may comment unfavorably in his closing argument. Thomas v. State, 1921, 206 Ala. 416, 90 So. 295, 296."

The rule which appellee urges is discussed in III Wigmore on Evidence, §898, as "the last remnant of the broad primitive notion that a party must stand or fall by the utterances of his witness." "This primitive notion," says Professor Wigmore, "resting on no reason whatever, but upon mere tradition, and irrationally forbidding any attempt to question the utterances of one's own witness, was obliged to yield its ground before reason and common sense . . ." The author explains the origination of the rule in the primitive modes of trial when a party stood or fell upon his compurgators. "The primitive notion that a party is morally bound by the

statements of his witnesses, [emphasis in original], no longer finds defenders, although its disappearance is by no means far in the past. In the early 1800's the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness." As early as 1829 the Court of Appeals for this District in US v. Watkins, 1829, 3 Cranch. CC 441, 3 DC 441, Fed. Cas. No. 16,649, repudiated this notion, and thereafter in Wynne v. Boone, (1951), 88 US App DC 363, 191 F2d 220, and Pritchett v. United States, (1950), 87 US App DC 374, 185 F2d 438, both decided after Swagart.

Of a similar tenor is an argument which, being aware of its technical merit, we were reluctant to advance to this Court in our main brief. This, out of a deference to the purposes of our judiciary to have cases decided on their merits. But if we are on the one hand to answer such arguments, we reply in kind:

A verdict may not be directed against the plaintiff after the defendant has opened its case and before all parties have finally rested.

The time for directing a verdict in favor of the defendant was at the close of the plaintiff's case, or at the close of all of the evidence, as stated in French v. National Laundry Co. (1908), 31 App DC 105, 108. Once defendant had opened its case by the introduction of some evidence a directed verdict was then precluded until all parties had rested. Crean v. McMahon, (1907), 106 Md 507, 68 A. 265, 14 LRA (NS) 798; 64 Corpus Juris, §424 Trial, p. 431, note 18 and cases there cited. This rule has not been modified by the Federal Rules of Civil Procedure. Rule 50 simply deals with non-waiver of the right to offer evidence after such a motion, and the reservation of a motion made after all the evidence is in. This is seen by the survival of the rule that the failure to renew a motion for directed verdict at the close of all of the evidence waives the right to question the legal sufficiency of the evidence to go to the jury. 5 Moore's Fed. Practice, ¶ 50.05[1].

Defendant offered evidence in the lower Court before the plaintiff rested by obtaining leave of the Trial Court to adopt the police witness as his own for certain purposes.

[JA 51] "The Court: I think that is beyond the scope of the direct examination.

"Mr. Graham: For this purpose, your Honor, I will make this Officer my own witness."

The Court then inquired how long counsel would be and then gave him leave. Counsel then opened the case for the defense by introducing evidence on its own behalf when appellee asked the witness: [JA 52] "Q. Officer, did you ascertain where Mr. Johnson was employed, if he were employed? A. I have indicated here that he was unemployed."

There is no distinction drawn in the rule to allow the motion to be made before defendant has rested if the evidence offered is inconsequential. The defendant has by offering evidence waived the right to question the sufficiency of the evidence at that time. The defendant cannot thereafter try its case piecemeal by making successive motions before it rests. The reason for this is given in Crean v. McMahon, (1907), 106 Md. 507, 14 LRA (NS) 798, 68 A. 265, 269, "[in] that the evidence offered by the defendant may and often does, supply a defect in the proof of the plaintiff."

This point is urged in answer to appellee's argument and it is suggested that if plaintiff's case is to be burdened with a technical deficiency which may be overcome at a subsequent trial, then, in a similar spirit the case ought to be remanded for a new trial for the foregoing reason.

CONCLUSION

Appellant respectfully submits that the dispute on the facts evidenced by this Reply demonstrates that the case should have gone to the jury for a resolution of those facts; that the jury is not bound to accept, contrary to other evidence in the case, the explanation of the driver regardless of which party offers his evidence; that there was ample evidence of the negligence of appellee's driver; and the doctrine of last clear chance applies to the circumstances of this case.

Respectfully submitted,

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